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WITH A TABLE OF THE NAMES OF CASES REPORTED,
A TABLE OF THE NAMES OF CASES CITED,
A TABLE OF THE RULES AND ORDERS CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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ERRATA.

Page 328, line 10 from bottom, for "by" read "to."

Page 372, line 8 from bottom, for "by" read "my."

ONTARIO PRACTICE REPORTS.

RICE V. KINGHORN ET AL.

Costs—Mortgage Action—Appearance—Judgment—Rule 718 (1349).

Where a defendant in a mortgage action desires only to dispute the amount claimed, but, instead of giving the notice referred to in Rule 718 (1349), enters an appearance in which he disputes the amount, judgment cannot be entered on *præcipe*; a motion to the Court becomes necessary, and the defendant so appearing must pay the additional costs of it:—

Semble, in such a case, that where there are several defendants, there should be only one judgment against all.

[September 12, 1895.—*Rose, J.*]

MOTION by the plaintiff in an action upon a mortgage for foreclosure, etc., for a direction to the local Registrar at Kingston to enter judgment, or, in the alternative, for leave to set the action down for hearing by way of motion for judgment, and for judgment.

The writ of summons was specially indorsed. There were four defendants, viz., H. M. Kinghorn, A. Kinghorn, Roddy, and Lewis. The defendants Roddy and Lewis were served with the writ of summons, but did not appear, and filed no notice disputing the amount claimed. The defendants Kinghorn entered an appearance, in which they “disputed the amount claimed by the plaintiff,” and stated that they did not require a statement of claim. The local Registrar refused to enter judgment on *præcipe*.

By Rule 1349, Rule 718 is rescinded and the following substituted therefor:—

“718. Where the defendant does not appear, or by his statement of defence admits the execution of the mortgage and other facts, if any, entitling the plaintiff to a judgment, or where the defendant disclaims any interest

in the mortgaged premises, or where no statement of defence is delivered, or where notice is filed and served disputing the amount of the plaintiff's claim only, the plaintiff is, on *præcipe* to the Registrar * * to be entitled to judgment * *."

The motion was argued before ROSE, J., in Court, on the 12th September, 1895.

W. H. Blake, for the plaintiff.

No one appeared for the defendants.

Judgment was delivered on the same day.

ROSE, J.—As the defendants the Kinghorns quite unnecessarily entered an appearance, they have prevented Rule 1349, amending Rule 718, literally applying. They, therefore, cannot complain that the plaintiff has followed the practice laid down in *Mahoney v. Horkins*, 14 P. R. 117. The application to set down may, therefore, be granted, and judgment go in the form settled in the case referred to. The plaintiff must have her extra costs against such defendants.

Where there are, as here, several defendants, probably the better practice will be to have only one judgment against them all, upon notice of motion for judgment.

CHAMBERS V. KITCHEN.

Revivor—Order for, after Judgment—Motion to Set Aside—Rule 622.

Order and decision of STREET, J., 16 P. R. 219, refusing to set aside order of revivor, affirmed.

[September 27, 1895.—*The Court of Appeal.*]

AN appeal by W. E. Kelly, made plaintiff by order of revivor, from the order and decision of STREET, J., 16 P. R. 219, dismissing a motion by the appellant to set aside a *præcipe* order reviving the action in the name of the appellant, who was the executor of the will of the original plaintiff. The action was brought to obtain a declaration that the defendant's interest in certain land conveyed to him by the original plaintiff was at an end under the terms of the conveyance. After judgment entered for the plaintiff upon default of defence, the plaintiff died, and the defendant, desiring to have the judgment set aside and to be let in to defend, issued the *præcipe* order reviving the action.

The appeal was heard before HAGARTY, C. J. O., and BURTON, OSLER, and MACLENNAN, JJ. A., on the 27th September, 1895.

L. F. Heyd, for the appellant. The judgment pronounced in the original action was final, and no cause of action survived or continued in the appellant, who cannot be compelled to proceed, as the action is at an end. The cause of action was merged in the judgment, which was final and binding on the original parties. Rules 620, 621, and 622, are not applicable; the only Rule applicable is 886, and it was intended to cover cases of this kind. I refer to *Arnison v. Smith*, 40 Ch. D. 567, and *Attorney-General v. Birmingham*, 15 Ch. D. 423.

H. J. Scott, Q. C., for the defendant, was not called upon.

THE COURT dismissed the appeal with costs, agreeing with the opinion of STREET, J.

YOUNG V. ERIE AND HURON R. W. CO.

Particulars—Demand—Compliance—Restriction.

Where a party complies with a demand for particulars of his claim, he will be restricted at the trial to the particulars given by him, without any order for the purpose.

[October 2, 1895.—*The Master in Chambers.*]

MOTION by the defendants for an order that the plaintiff be restricted in giving evidence under paragraph 6 of his statement of claim, as to the damages alleged in that paragraph to have been sustained by him, to evidence of the alleged damages whereof the plaintiff delivered particulars to the defendants on the 20th September, 1895; such order to be without prejudice to the defendants' right to object to the admission of any evidence of such alleged damages.

The action was brought to compel the defendants to construct and maintain certain fences along the line of the defendants' railway where it crossed the plaintiff's farm, and for damages occasioned by the neglect of defendants to construct such fences.

The 6th paragraph of the statement of claim was as follows: "By reason of such neglect the plaintiff has sustained damages, and, unless such fences are forthwith constructed, the plaintiff will continue to suffer damages by reason of such neglect of the defendants."

In the 8th paragraph the plaintiff claimed \$1,000 damages.

On the 18th September, 1895, the defendants demanded full particulars in writing of the damages alleged in the 6th paragraph; and on the 20th September the plaintiff gave particulars as demanded.

The defendants now sought to restrict the plaintiff to such particulars at the trial.

The motion was argued before the Master in Chambers on the 1st October, 1895.

W. H. Blake, for the defendants.

Masten, for the plaintiff.

Judgment was delivered on the following day.

THE MASTER IN CHAMBERS.—I am not aware of any rule or practice authorizing the making of such an order under the circumstances of this case. Whether the plaintiff was bound under his pleading to give any particulars at all need not be considered. The defendants apparently are satisfied with them, as they do not move for further or better particulars. The plaintiff is bound by them unless the trial Judge gives him liberty to amend, or considers it a case not requiring particulars. I am of opinion that where a party complies with a demand for particulars of his claim, no order is necessary to restrict him to such particulars, he being restricted under the practice of the Court to the particulars served by him.

The motion will be refused with costs to the plaintiff in any event.

SUMMERFELDT V. JOHNSTON.

Costs—Taxation—Claim and Counterclaim.

Where judgment is given for the plaintiff upon his claim with costs, and for the defendant upon his counterclaim with costs, the amounts to be set off, the costs should be taxed so as to allow the plaintiff the costs on his claim as though he had wholly succeeded in the suit, and the defendant the costs of the counterclaim as though he had wholly succeeded in the suit.

[July 17, 1895.—*Meredith*, C. J.]

APPEAL by the plaintiff from an order of the Master in Chambers reversing the ruling of one of the taxing officers as to the taxation of costs.

At the trial before the Chancellor without a jury, he directed judgment to be entered for the plaintiff, after giving all credits, for \$440 with costs; and for the defendant on his counterclaim, after giving all credits, for \$360 with costs; the amounts to be set off and the balance paid according to the result.

The question was as to the principle upon which the costs of the parties, according to the terms of this judgment, were to be taxed.

The taxing officer gave the plaintiff the general costs, deducting such items as related exclusively to the counterclaim, and deducting also the amounts by which the bill was increased by reason of the counterclaim, and he allowed the defendant only the costs incurred by him over and above the costs which he would have incurred in defending himself against the plaintiff's claim.

Upon appeal to the Master in Chambers, he reversed the decision of the taxing officer, and decided that the costs should be taxed so as to allow the plaintiff the costs on his claim as though he had wholly succeeded in the suit; and in like manner to allow the defendant his costs of the counterclaim as though he had wholly succeeded in the suit; and the present appeal was from the order of the Master referring it back to the taxing officer to tax the costs on that principle.

The appeal was argued before MEREDITH, C. J., in Chambers, on the 14th June, 1895.

Day, for the plaintiff, cited *Saner v. Bilton*, 11 Ch. D. 416; *Mason v. Brentini*, 15 Ch. D. 287; *Re Brown, Ward v. Morse*, 23 Ch. D. 377.

W. H. McFadden, for the defendant, relied on *Shrapnel v. Laing*, 20 Q. B. D. 334; *Finska v. Brown*, W. N. 1891, p. 116; *Amon v. Bobbett*, 22 Q. B. D. 543.

Judgment was delivered on the 17th July, 1895.

MEREDITH, C. J.—In *Shrapnel v. Laing*, 20 Q. B. D. 334, the Court of Appeal determined that the claim and counterclaim were for the purposes of the taxation to be treated as separate and independent actions, and the costs in each taxed in favour of the successful party, subject to a deduction in respect of any issues on which he has not succeeded.

To the same effect is *Griffiths v. Patterson*, 22 L. R. Ir. 660; and in *Link v. Bush*, 13 P. R. 425, the full Court, Common Pleas Division, recognized the rule laid down in *Shrapnel v. Laing* as the correct one. See also *Finska v. Brown*, 7 Times L. R. 578. In the latest case on the subject which I have been able to find, *Stumore v. Campbell*, [1892] 1 Q. B. 314, the procedure on counterclaim is stated to be precisely the same for all purposes, except execution, as if the claim and counterclaim were two separate actions.

I confess that I am unable to apprehend the distinction between such cases as those to which I have referred and the cases cited by Mr. Day; nor can I understand the fairness of a rule that would give to the plaintiff his costs on the basis contended for, and limit the defendant to receiving only such additional costs as he has incurred by reason of the counterclaim.

It is quite true that he has had the advantage of having had the claim of the plaintiff determined in the same proceeding in which his counterclaim has been dealt with,

and in a certain sense he has incurred no more costs by reason of the counterclaim being set up than he would have incurred in an action involving only the claim of the plaintiff, or than he will be indemnified for by allowing him costs on the basis which the plaintiff contends is the one properly applicable; but at the same time the plaintiff has had the benefit of having the counterclaim, which otherwise would have been the subject of an independent action, disposed of by the same proceeding by which his own claim has been established, and he too would be indemnified by giving him only the additional costs incurred by uniting with the counterclaim the claim upon which he has succeeded.

The Master's order is, therefore, in my opinion, right, and should be affirmed, and the appeal from it dismissed with costs.

If I had been at liberty to go behind the judgment, I should probably have come to a different conclusion, as the defendant's counterclaim was really the subject of and might have been pleaded as a set-off, but I am concluded by the judgment from entering on that inquiry.

BOULTBEE V. COCHRAN ET AL.

*Parties—Third Party Procedure—Relief Over—Amendment—Time—
Rules 328-332—Order—Discretion—Appeal.*

An action was brought against two defendants, one of whom suffered judgment by default; the plaintiff proceeded against the other, claiming by virtue of an assignment from the first of his cause of action against the second, which was in the nature of a claim for indemnity against liability for the claim on which the judgment by default had been suffered. At the trial the action was dismissed against the second on the ground that the assignment was inoperative. Upon an appeal by the plaintiff to a Divisional Court, an order was made directing that, notwithstanding the assignment, the first defendant should be allowed to amend the pleadings by claiming over against the second defendant, who was to be allowed also to amend, and further evidence was to be taken, if necessary:—

Held, not a mere discretionary order, but one from which an appeal lay. *Hately v. Merchants' Despatch Transportation Co.*, 12 A. R. 640, followed.
2. That the order could not be sustained under Rules 328-332 (1313) or otherwise, as it was made at too late a stage, and upon the application of the plaintiff only.

[October 29, 1895.—*The Court of Appeal.*]

THIS was an action begun on the 21st April, 1894, brought by Alfred Boulton against Robert Cochran and Casimir S. Gzowski, to recover \$2,125 and interest.

The defendant Cochran did not appear, and judgment was entered against him for default.

The statement of claim alleged that on the 22nd October, 1887, the plaintiff was the holder of twenty fully paid up shares of the stock of the Central Bank of Canada, and on that day sold and transferred them to the defendant Cochran, who on the 27th October, 1887, sold and transferred them to the defendant Gzowski; that within one month after the 22nd October, 1887, the bank suspended payment; that the plaintiff was made a contributory in proceedings to wind up the bank, as a holder of such shares within one month of the suspension, and was called upon and compelled to pay to the liquidators \$2,125, the amount of the call upon the twenty shares and interest, which should have been paid by the defendants or one of them; and that the defendant Cochran, by assignment dated 30th April, 1894, had transferred to the plaintiff all

his claim or action against the defendant Gzowski in respect to the twenty shares.

The defendant Gzowski set up several defences, which it is unnecessary to specify.

The action was tried before FERGUSON, J., who, on the 2nd January, 1895, gave judgment dismissing it with costs as against the defendant Gzowski, and refusing to allow an amendment asked for at the trial, making Cochran a party plaintiff.

The plaintiff appealed from this judgment to the Queen's Bench Divisional Court.

On the 14th February, 1895, ARMOUR, C. J., gave the direction of the Court as follows:—

In order that we may be able to properly dispose of the substantial questions raised in this case, unincumbered by technical considerations, we think that the pleadings ought to be amended by allowing Cochran, if he desires to do so, to claim over against Gzowski, and by allowing the plaintiff, as an alternative, to offer to concur in the recovery over against Gzowski by Cochran, notwithstanding the assignment to the plaintiff of the rights of the latter. These amendments being made, the defendant Gzowski will be at liberty to plead to the amendments, and, if further evidence is required by reason of the amendments, we will hear such evidence in Court.

An order having been issued in accordance with this direction, the defendant Gzowski appealed from it to the Court of Appeal, and his appeal was argued before HAGARTY, C. J. O., and BURTON, OSLER, and MACLENNAN, JJ. A., on the 25th and 26th September, 1895.

Moss, Q. C., for the appellant. There was no right of action by the plaintiff against the appellant, as properly held by the trial Judge. The appellant was, therefore, never a proper party to this action. The Court below had

no power to make the order appealed against, which, in substance, directs the institution of a new action. The appellant, not having been properly before the Court in the first instance, cannot now be retained as a party for the purpose of enabling the plaintiff to obtain relief against him in another form of proceeding, which the plaintiff could not have adopted in the first instance. The appellant never was a transferee of the shares, within the meaning of the Bank Act. Under the circumstances there could be no power to direct an issue between the defendants: *Walker v. Dickson*, 20 A. R. 96. Cochran's name appears on the record, though he is no proper party to the action as framed against the appellant, and the Court below treats him as a defendant still before them.

H. J. Scott, Q. C., for the plaintiff. The question of the correctness of the judgment of the trial Judge does not arise upon this appeal; that is a matter still standing for judgment before the Court below. That Court has directed an amendment which it had jurisdiction to make, and its order is a discretionary one and should not be interfered with on appeal. All necessary parties were before the Court at the trial, and are before the Court now, to determine any questions arising out of the transactions to which the action relates. The amendment should have been made, if necessary, at the trial, and the defendant Cochran there consented to any amendment that might be made. No new party is added, and if, in the opinion of the Court, it was necessary that the amendment should be made for the purpose of determining the questions in issue, it was the duty of the Court to direct it. The order appealed against is merely interlocutory, under Rule 585, and no appeal lies. A defendant has a right to make a claim against a co-defendant: Rule 328 *et seq.* The intention of the Rules is that all substantial questions arising in the action should be fought out.

Moss, in reply, referred to *Edevain v. Cohen*, 41 Ch. D. 563.

Judgment was delivered on the 29th October, 1895.

BURTON, J. A.—I agree in the view that this appeal should be allowed.

I am unable myself to understand what technical considerations stood in the way of the proper disposition of the substantial questions raised in the case.

Those questions, and the only questions, were whether the two defendants, or either of them, were liable to an action at the suit of the plaintiff; there was no privity between the plaintiff and Gzowski, and as to him, therefore, the action was properly dismissed. Cochran did not dispute his liability, and as to him final judgment was entered. If Gzowski had been brought in as a third party in the ordinary course, he might have urged any defence to the action or disputed the amount; but of what benefit would it be to make him a party to the suit so long as the judgment against Cochran stands?

Cochran is deprived of no remedy to which he may be properly entitled against any person who may be under obligation to indemnify him.

But, apart from these considerations, the order appealed against, was obtained not at the instance of Cochran, but of the plaintiff, who has no *locus standi*, and this alone, I think, ought to have been sufficient to dispose of the application by leaving the parties to their appropriate remedies.

OSLER, J. A.—The plaintiff's direct claim was against Cochran only, to whom he had sold the shares, and against whom he appears to have obtained judgment in the action by default of appearance, which was necessarily a final judgment. As against him, therefore, nothing remained to be done, and his presence at the subsequent proceedings in the action against the defendant Gzowski was unnecessary. Against that defendant the statement of claim was delivered, which sets up another cause of action, viz., a claim by the plaintiff as assignee of Cochran of his alleged right of action arising out of the re-sale of the shares which he had bought from the plaintiff.

With this claim the trial was wholly occupied, and the trial Judge disposed of it by holding that the assignment was inoperative and passed nothing. He was further of opinion that Gzowski had never in fact become the owner of the shares, and that there was no contract or privity between him and the plaintiff in respect of them.

On the plaintiff's application to the Divisional Court by way of appeal from that judgment, the order was made which is now in question, by which the defendant Cochran was allowed, if so advised, to amend the pleadings in the action by claiming over against the defendant Gzowski; the plaintiff, as an alternative, to offer to concur in the recovery over against Gzowski, notwithstanding the assignment.

If this order can be supported, it must be under Rules 328 and 332 (c) of September, 1894 (1313), and as intended to give the defendant Cochran an opportunity of asserting in his own name, notwithstanding the assignment, a claim to be indemnified over by Gzowski against his liability to the plaintiff. On this assumption the plaintiff never had a cause of action against Gzowski, who could only have been brought in by Cochran under the third party Rules. But Cochran, having suffered judgment by default, and nothing remaining to be tried in the action as between him and the plaintiff, could not, as I interpret those Rules, have brought in a third party at that stage of the proceedings.

The object of the Rules, no doubt, is to provide that as nearly as possible there shall be but one trial of the two questions, viz., the plaintiff's own claim against the defendant, and the claim of the latter to relief over, or, as Bacon, V.-C., expresses it in *Edison and Swan Electric Light Co. v. Holland*, 33 Ch. D. 497, "that there should be a discussion and a decision, once for all, of the real substance of the dispute." Where, however, nothing remains to be tried in respect of the plaintiff's claim, and it has been determined and the amount ascertained by judgment before the application to bring in the third party, or to raise

the question as between two defendants where one claims relief over against the other, there is no reason why the action should be opened to try that question. It is then too late for the third party or co-defendant to question the propriety of the plaintiff's recovery in the action, which is what he would have been at liberty to do had he been brought in at the proper time, viz., before trial or judgment: *Caister v. Chapman*, W. N. 1884, p. 31; *Rich v. Darrett*, 28 Sol. J. 513; *Flower v. Todd*, W. N. 1884, p. 47. In the latter case there were two defendants sued as partners; one suffered judgment by default, and the plaintiff was proceeding to trial against the other. The defendant who had suffered judgment by default was permitted to claim over against his co-defendant. There, however, there was but the one cause of action, and the motion was made before the trial. The principle acted on in these cases must apply to the case at bar, for, although Gzowski was a co-defendant from the first, it is only now that it is sought to reach him by means of the third party procedure, which, if applied, must result (for that is the least he is entitled to) in a complete trial of the issue which would be raised between himself and his co-defendant. Whether the plaintiff can recover against Gzowski on the pleadings as they stand, is a question still before the Divisional Court, and the issues raised between them have been tried. But whether Cochran can recover against him as a third party or as co-defendant, is an issue which has never yet been raised, and, as one arising out of or connected with the plaintiff's recovery against Cochran, is, in my opinion, a question which it is too late at this stage of the case to raise.

I do not regard the order as a mere discretionary order. The defendant Gzowski has, I think, a right to say that the action should not now as against him be re-cast, but should be disposed of on the issues as they stand between himself and the plaintiff.

It was urged that the order was not an appealable one; but the case of *Hately v. Merchants' Despatch Transportation Co.*, 12 A. R. 640, disposes of that contention.

We have nothing to do with the merits of the case as between the co-defendants, or the plaintiff and Gzowski, and express no opinion thereon.

I am, therefore, respectfully of the opinion that the appeal should be allowed.

MACLENNAN, J.A.—I am of opinion that this appeal should be allowed, and that the order appealed against should be discharged.

The action is brought against Mr. Cochran and Mr. Gzowski, and the claim against Mr. Cochran is for indemnity in respect of twenty shares of Central Bank stock alleged to have been sold and transferred by the plaintiff to him within thirty days of the suspension and failure of that bank, and in respect of which the plaintiff was compelled to pay a large sum, upwards of \$2,000, under the double liability clauses of the Bank Act. The claim against Mr. Gzowski is by virtue of an assignment to the plaintiff by the defendant Cochran of an exactly similar right of indemnity in respect of the same shares, by reason of the sale and transfer thereof alleged to have been subsequently made by Cochran to Gzowski. Cochran did not appear, but allowed final judgment to be signed against him by default. The case went on to trial against Gzowski before Mr. Justice Ferguson, who dismissed it on the ground that the assignment of the ²alleged claim by Cochran to the plaintiff was inoperative, and that nothing passed to the plaintiff thereby. On motion to the Queen's Bench Divisional Court against this judgment, the order now appealed against was made. I think the order cannot be supported.

The plaintiff brought his action against the two defendants, seeking to establish a liability against both of them. The one makes no defence, and final judgment is signed against him. The other makes defence, and the plaintiff is defeated. At the trial the plaintiff appears to have asked leave to amend by making Cochran a party plaintiff, but the application was refused. The motion to the Divi-

sional Court appears to have been made by the plaintiff, and there is no indication that Cochran was there represented. The order is expressed to have been made on the motion of the plaintiff and in presence of counsel for Gzowski, no mention being made of Cochran. And what the order does is to allow Cochran, if so advised, to amend the pleadings in the action by claiming over against Gzowski, and that Gzowski should be allowed to amend his defence, and, if any of the parties should desire to give further evidence on the issues raised by such amendments, such evidence would be heard by the Divisional Court on a day to be fixed for that purpose.

Mr. Scott was not able to cite to us any authority for such an order, and I am not aware of any. The nearest approach to authority for it is the new Order 332 (c), which is identical with the English Rule 177, Order 16, Rule 55, which provides that where a defendant claims indemnity against another defendant in an action, a notice may be issued and the same procedure shall be adopted, for the determination of such questions between the defendants, as would be issued and taken against him if he were a third party. The procedure so referred to is prescribed in Rule 328 and following Rules; and when we look at Rule 329, we see that when the procedure is resorted to, the defendant from whom indemnity is claimed has a right to dispute the plaintiff's claim in the action against the defendant seeking the indemnity, as well as his own liability to him. That provision, as well as the provision contained in Rule 332 (a) allowing the third party to defend the action and to appear at the trial and to take part in it, shews that it is too late for a defendant after final judgment signed against him to invoke the benefit of these Rules.

It is also to be observed that these Rules are intended for the benefit of defendants and not of plaintiffs, and that the procedure which they provide for may not be resorted to as of course, but can only be taken by leave of the Court or a Judge.

In the present case, so far as appears, Cochran never applied or intended to apply for any such leave, either to the learned Judge at the trial or to the Divisional Court, and the application was made in both places by and on behalf of the plaintiff. If the judgment of the learned Judge on the issue tried before him is right, the plaintiff has and can have no right to interfere as between the defendants. The defendant Gzowski may or may not be liable to Cochran, but, if he is, there can be no advantage of any kind in trying that liability in the present action, in the present stage of the proceedings, rather than in a new action between themselves.

I think the order should be discharged. I express no opinion upon the judgment of my brother Ferguson at the trial, which is not before us.

HAGARTY, C. J. O., concurred.

Appeal allowed with costs.

MAJOR V. MACKENZIE.

Security for Costs—Insolvent Plaintiff—Want of Beneficial Interest—Parties—Consent—Amendment—Discretion.

To entitle a defendant to security for costs, it is not sufficient to shew that the plaintiff is a man of no means and has no beneficial interest in the subject-matter of the action ; it must be shewn that it is really the action of some other person.

Gordon v. Armstrong, 16 P. R. 432, explained.

The defendant sought, in the alternative, to have the persons alleged to be really beneficially interested added as plaintiffs :—

Held, that they could not be added without their consent in writing : Rule 324 (b).

Leave given to amend the defence by setting up that these persons were necessary parties.

Semble, however, that the Court has a discretion, under Rule 319, to proceed in the absence of some of the persons interested in the question under adjudication.

[November 11, 1895.—*Street, J.*]

AN appeal by the defendant from an order of the Master in Chambers refusing the defendant's motion for an order requiring the plaintiff to give security for costs, or for an order adding as plaintiffs certain persons to whom the plaintiff had contracted to sell the land in question in the action, which was brought for the rectification of two mortgage deeds. The facts appear in the judgment.

The appeal was argued before STREET, J., in Chambers, on the 8th November, 1895.

J. T. Small, for the defendant.

J. J. Warren, for the plaintiff.

Judgment was delivered on the 11th November, 1895.

STREET, J.—I can find no evidence upon the papers before me that any person other than the plaintiff has instructed the bringing of this action, or has inter-meddled with it, or has had anything to do with it. I assume in favour of the defendant, for the sake of argument, that the plaintiff is a man of no means with unsatisfied judgments against him ; that he has entered into a

contract to sell the land in question to McCracken and Armstrong, and has received the purchase money for it. All these circumstances combined do not, without something further, justify me in finding that the action is not the plaintiff's action, but is McCracken and Armstrong's. Even were I to go further and assume that the plaintiff has actually conveyed the land to McCracken and Armstrong, there would still be wanting any link connecting them with the bringing of the action. Under such a state of facts as I am assuming to exist, it is probable that slight circumstances might be held sufficient to form that link so as to enable me to hold the action to be theirs; but here there is nothing beyond the suspicion that, because the plaintiff has no means, and has apparently no beneficial interest in the property, he is not likely to be maintaining the action himself. On the other hand, he certainly has a right, having sold the property and contracted to make a title, as I must assume he has in the absence of proof to the contrary, to take proceedings to have that which he alleges is a cloud upon it removed.

It was argued by the defendant's counsel very forcibly that it was not necessary in order to entitle the defendant to the order for security for costs, that he should shew facts to lead the Court to the conclusion that the action was not really the plaintiff's action; he insisted that it was sufficient for the defendant to make out that the plaintiff was a man of no means, and that he had no beneficial interest in the subject-matter of the litigation, and he relied on *Gordon v. Armstrong*, 16 P. R. 432, as supporting this contention. I have read with care that case and the cases on which it was founded, and I think it will be found that in that case, as well as in every one of these referred to in it in which security for costs was ordered, it was because it was considered from facts in evidence that the action was really the action of some person other than the plaintiff. I think, therefore, that the order of the Master, refusing to order the action to be stayed until security should be given for the costs, must be upheld.

The other branch of the appeal is from the refusal of the learned Master in Chambers to add as parties plaintiff the persons to whom the plaintiff has contracted to sell the land.

Under the Rules* no person can be added as plaintiff in an action, after its commencement, without his own consent in writing, and as there was nothing before the Master to shew that any such consent had been given, he was clearly right in refusing to make the order asked for.

The appeal must, therefore, be dismissed upon both branches with costs to the plaintiff in any event of the cause.

The defendant may have leave to amend his defence, if so advised, by setting up that the plaintiff has sold, or sold and conveyed, his interest in the land to McCracken and Armstrong, and that he should not be allowed to proceed with the action in their absence. I do not express any opinion upon the proposed amendment, nor as to the weight to be given to it, for the facts are not clear. The Court, under Rule 319, I wish to point out, has a discretion to proceed in the absence of some of the persons interested in the question under adjudication.

*Rule 324 (b).

MAY V. DRUMMOND.

Judgment—Recovery of Land—Ancillary Claim—Joinder of Causes of Action—Motion for Judgment.

The plaintiff, without leave, indorsed his writ of summons with a claim for recovery of land and to set aside a conveyance. The writ was personally served, and the defendant not appearing, the plaintiff delivered a statement of claim, and, on default of defence, moved the Court for judgment. It appeared from the statement of claim that the setting aside of the conveyance mentioned in the indorsement was sought by the plaintiff as a part of what was necessary to establish his title :—

Held, following *Gledhill v. Hunter*, 14 Ch. D. 492, that the action was to be treated as one for the recovery of land merely, in which judgment for default of appearance could have been entered without a motion ; or, if not, that the plaintiff had improperly joined another claim with a claim for the recovery of land, without leave ; and in either case the motion must fail.

[November 11, 1895.—*Street, J.*]

THIS was a motion by the plaintiff for judgment against the defendant for default of defence ; the defendant had not appeared to the writ of summons, nor had she filed any statement of defence in answer to the statement of claim, which had been posted up in the office of the registrar of the Division in which the action was brought.

The writ of summons was indorsed as follows : “The plaintiff’s claim is for recovery of possession and setting aside the conveyance of Francis Tremayne and A. B. Lambe to the defendant of lots G., H., and I. on registered plan 5B., situate in Mimico, in the township of Etobicoke, in the county of York.

The defendant, having been served with the writ, failed to appear, and the plaintiff then proceeded to serve a statement of claim by posting it up in the office in which the proceedings were being conducted, and, upon the defendant’s further default in delivering a defence, the plaintiff set the action down upon motion for judgment upon the statement of claim, under Rule 728.

The statement of claim, in addition to a claim for recovery of the land mentioned in the writ and for mesne profits and costs, asked to have it declared that a certain pretended will of one Pidgen was void ; that the said

Pidgen died intestate; and that certain persons therein named³ were his heirs and heiresses at law and entitled to his real estate; and that the plaintiff was now entitled thereto; and that a certain pretended sale and conveyance from a sheriff to one Elizabeth Pidgen was invalid; and that the defendant had derived no title under it.

The motion was heard by STREET, J., in Court, on the 7th November, 1895.

J. A. Donovan, for the plaintiff.

No one appeared for the defendant.

Judgment was delivered on the 11th November, 1895.

STREET, J.—It was stated upon the motion by counsel for the plaintiff, no one appearing for the defendant, that the will and sheriff's deed referred to covered a number of other parcels of land; that the plaintiff has brought some ten or twelve other actions for the recovery of these parcels against the various persons owning them, and that these other actions are defended and are now pending and have not been tried; and that the validity of the same will and conveyance is in question in them. Under these circumstances, it is obviously undesirable that any declarations of right which might affect other pending actions should be made upon this *ex parte* motion, unless the practice entitles the plaintiff to them.

Under Rule 341 the plaintiff is forbidden to join with an action for the recovery of land any other cause of action save those in the Rule mentioned, unless by leave of the Court or a Judge. By Appendix No. 6 to the Rules a claim to establish the plaintiff's title to the land for the recovery of which the action is brought may be combined, in the indorsement, with the claim to recover the land. Under the decision in *Gledhill v. Hunter*, 14 Ch. D. 492, the claim so combined is to be treated as an action for the recovery of land merely, and not as an action for something else as well. This being the case, I think I should treat

the indorsement on this writ as, in the whole, an indorsement of a claim for the recovery of land, because, as I now learn from the statement of claim, the setting aside of the conveyance mentioned in the indorsement was a part of what the plaintiff must do to establish his title, just as the setting aside of the lease in *Gledhill v. Hunter* was necessary in order to entitle the plaintiff there to recover. Without the knowledge obtained from the statement of claim the indorsement would not have been so interpreted. Looking at the indorsement on this writ, then, with the light thrown on it by the statement of claim, the action is simply and solely an action for the recovery of land; the defendant has been personally served and has failed to appear. The practice to be followed in such cases is laid down by Rule 714, viz., that the plaintiff "shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land." This is the judgment that the plaintiff should have entered upon the defendant's default of appearance, and he is entitled to nothing more.

If, however, I am wrong in this view, then the action must be treated as being for the recovery of land and for another cause of action in addition, and the plaintiff's proceedings are then irregular under Rule 341, and he is not entitled to move for judgment until he has put himself right under the practice, which would probably require his beginning almost *de novo*.

In either view, he is irregular in setting the case down on motion for judgment on the statement of claim, and the motion must be refused.

The plaintiff should have leave to take an order allowing him to take the statement of claim off the files, if he desire to do so, in order that it may not stand in the way of his entering judgment for possession of the land.

MORRIS ET AL. V. CONFEDERATION LIFE ASSOCIATION ET AL.

Parties—Unauthorized Proceedings—Solicitor—Judgment—Relief—Laches—Repayment of Moneys.

A person who finds himself a party plaintiff to proceedings which he has never authorized is entitled to be relieved from liability in connection with them, whether the solicitor in fault be solvent or not; and the fact that an order dismissing the action has been issued before the applicant becomes aware that his name has been used makes no difference in the rule.

Nurse v. Durnford, 13 Ch. D. 764, followed.

Delay in moving to set aside the proceedings from the 1st August to the 25th September:—

Held, not a bar to relief, where no detriment had resulted to the defendants thereby.

The sheriff having seized the plaintiff's goods under execution upon an order dismissing the action with costs, the plaintiff paid the costs to the sheriff, who undertook to hold the amount for ten days, "to be returned if writ set aside, and if not within that time, to be applied in payment of execution." After the lapse of more than ten days, during which the plaintiff took no step, the sheriff paid over the money to the defendants. The plaintiff having afterwards established his right to be relieved from liability:—

Held, that he was entitled to be repaid by the defendants.

[November 18, 1895.—*Street, J.*]

THIS was an appeal by the defendants the Confederation Life Association from an order of the Master in Chambers, made on 31st October, 1895, under the following circumstances:

The present action was brought in the names of T. R. Morris and A. W. Morris, against the Confederation Life Association and two other persons named Ingham and Kidd; it was not prosecuted with proper diligence, and on 22nd June, 1895, upon the application of the defendants the Confederation Life Association, an order was made dismissing it as against them for want of prosecution with costs. Upon this order the costs were taxed to the Confederation Life Association, and execution was placed in the sheriff's hands against both plaintiffs. Under this execution the goods of the plaintiff T. R. Morris were seized, and on 1st August, 1895, his solicitor paid to the sheriff \$76.80, the amount of the execution and costs, taking from him a receipt in writing, in which the sheriff acknowledged

receipt of the amount "to be held by the sheriff for, say ten days, as security for the goods seized, to be returned if writ set aside, and if not within that time, to be applied in payment of execution."

The plaintiff T. R. Morris, who paid this money, contended that the action had been brought without his authority, in his name, and that he had never authorized the use of his name as a plaintiff.

On 3rd September, 1895, no further steps having been taken by T. R. Morris, the sheriff applied the money in payment of the execution and paid it over to the Confederation Life Association, returning the writ at the same time.

On 16th September, 1895, the solicitor for the defendants Ingham and Kidd gave notice of motion to dismiss the action as against them for want of prosecution.

On 25th September, 1895, the plaintiff T. R. Morris made the affidavits on which he relied in support of the motion made shortly afterwards to set aside the action and execution so far as he was concerned. Upon this motion an order was made on 31st October, 1895, by the Master in Chambers ordering the repayment by the Confederation Life Association of the moneys paid to them by the sheriff, and ordering the solicitor who had issued the writ of summons in the name of the two plaintiffs to pay the costs of the action and of the motion, as between solicitor and client, and allowing the defendants the Confederation Life Association to amend their execution by striking out the name of T. R. Morris and to redeliver it to the sheriff for execution.

The defendants the Confederation Life Association appealed against this order, and the appeal was argued before STREET, J., in Chambers, on 8th November, 1895.

Snow, for the appeal.

G. L. Lennox, for T. R. Morris.

Judgment was delivered on the 18th November, 1895.

STREET, J.—Apart from the question of the delay in moving on the part of T. R. Morris, I think the authority of *Nurse v. Durnford*, 13 Ch. D. 764, has laid down the rule to be followed in such cases as the present, viz., that a person who finds himself a party plaintiff to proceedings which he has never authorized, is entitled to be relieved from liability in connection with them, whether the solicitor in fault be solvent or not. I do not see that the fact of an order dismissing the action having been taken out by the defendant before the applicant became aware that his name had been used can make any difference, when the reasoning upon which that case is founded is considered. In the *Anonymous Case* in 1 Salk. at p. 88, the fact that judgment had been recovered in the action against a defendant for whom a solicitor had appeared without warrant, does not appear to have been considered an obstacle in the way of giving the defendant relief.

Then upon the question of delay, the plaintiff appears to have become aware on 1st August, 1895, of the fact that his name had been used and to have protested at once; he did not, however, move until 25th September to set aside the proceedings. The delay has not been explained in any way, and the plaintiff by delaying has certainly run serious risk of being considered to have acquiesced in what had been done in his name. The learned Master in Chambers has, however, considered the lapse of time not to debar the plaintiff from relief, having, perhaps, taken into consideration that vacation was not over until 1st September, and that no detriment to the defendants has been shewn to have been the result of the delay.

In my opinion, the appeal should be dismissed with costs.

EMPIRE OIL COMPANY V. VALLERAND.

Writ of Summons—Service out of Jurisdiction—Rule 271 (e)—Contract by Correspondence—Place of Performance—Breach.

The plaintiff, in London, Ontario, wrote to the defendant in Quebec, offering to take a quantity of empty oil barrels. The defendant, by letter posted in Quebec, accepted the offer, saying he would ship them, but some time afterwards wrote again, refusing to do so :—

Held, that this contract was made in Quebec, and, in the absence of an express agreement to the contrary, was to be performed there by delivery of the goods to carriers to be carried to London; and the cause of action was, therefore, not one in respect of which service of the writ of summons out of the jurisdiction could properly be allowed under Rule 271 (e), (1309).

Judgment of the County Court of Middlesex reversed.

[October 29, 1895.—*The Court of Appeal.*]

THIS was an appeal by the defendant from the judgment of the County Court of Middlesex.

The action was brought in that Court to recover \$200 for damages, (a) for breach by the defendant of a contract to accept and pay for certain car loads of oil; and (b) for breach by the defendant of a contract to deliver to the plaintiff, at the city of London, in the Province of Ontario, five hundred empty oil barrels; the damages claimed for the latter breach being \$50. The defendant lived and carried on business in the city of Quebec, in the Province of Quebec. On the 19th February, 1895, an order was made allowing the plaintiff to issue a writ of summons for service out of the jurisdiction. The writ was issued on the same day, and was subsequently served out of the jurisdiction. The defendant in his defence denied all the allegations of the plaintiff, pleaded a release before action, and disputed the jurisdiction of the Court. On the 29th April, 1895, an order was made, on the application of the defendant, restricting the plaintiffs at the trial of the action to those causes of action, if any, for which a writ of summons might properly be issued for service out of the jurisdiction.

The action was tried at London, on the 11th June, 1895, by His Honour William Elliot, the senior Judge, without a jury, and the plaintiff having abandoned the claim for damages for breach of the contract to purchase oil, judgment was given in his favour for \$5 damages on the other branch of the case, without costs.

Upon motion by the plaintiff in term for a new trial, or to increase the damages to \$50, and for their costs of the action, the Judge made an order varying his judgment by giving the plaintiff costs of the action on the County Court scale.

The contract for the sale of the barrels was made by correspondence between the plaintiff at London and the defendant at Quebec; the barrels were to have been shipped from Quebec to London; and the principal contention of the defendant was that the breach, if any, was in Quebec, and that the action was, therefore, not cognizable in Ontario, under Rule 271 (1309), which provides that "service out of the jurisdiction of a writ of summons * * may be allowed * * whenever * * (e) the action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which is to be performed within the jurisdiction * *."

The defendant appealed from the judgment and subsequent order of the County Court Judge, and his appeal was argued before HAGARTY, C. J. O., and OSLER and MACLENNAN, JJ.A., on the 19th September, 1895.

Talbot Macbeth, for the appellant. The Court below had no jurisdiction: Rule 271 (e); *Bell v. Antwerp, etc., Line*, [1891] 1 Q. B. 103; *The Eider*, [1893] P. 119. The contract was not one that must necessarily be performed wholly within Ontario. The vendor's duty was at an end as soon as the barrels were delivered to the carriers at Quebec; he was not bound to deliver in London: *Tregelles v. Sewell*, 7 H. & N. 574; *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 322; Benjamin on Sales, 6th Am. ed., p. 321. The converse case is *Fisher v. Cassady*, 14 P. R. 577. At

all events the Judge had no power in term to alter his disposition of the costs: R. S. O. ch. 47, sec. 41. If there was jurisdiction at all in any Court in this Province, the action should have been brought in the Division Court at London, where the breach was, if there was any breach in this Province, and the plaintiffs should, therefore, have only Division Court costs, and the defendant his costs on the County Court scale, to be set off. The letter of the defendant refusing to deliver the barrels was the breach, and that was in Quebec: *Offord v. Bresse*, 16 P. R. 332; *Hamilton v. Barr*, 18 L. R. Ir. 297.

Gibbons, Q. C., for the plaintiffs. The delivery was, upon the correspondence, clearly to be at London. The contracts in the cases cited were quite different. *Primâ facie* the plaintiff was entitled to County Court costs; and the Judge had power to amend his judgment. A Division Court would have had no jurisdiction, even since 57 Vict. ch. 23, sec. 12 (O.): *Re Brazill v. Johns*, 24 O. R. 209; *King v. Farrell*, 8 P. R. 119; *In re Franklin v. Owen*, 31 C. L. J. 321, 353; 15 C. L. T. Occ. N. 158, 185.

Macbeth, in reply.

Judgment was delivered on the 29th October, 1895.

OSLER, J. A.—The judgment was for the plaintiff at the trial for \$5 without costs. In term the direction as to costs was varied, and it was ordered that the plaintiff should recover costs on the County Court scale in respect of the cause of action on which he had succeeded.

The defendant contends that the plaintiff failed to prove a cause of action for which a writ of summons could properly have been issued for service out of the jurisdiction, in accordance with the condition on which he had been allowed to proceed with the action, and that the action should, therefore, have been dismissed. As to the costs, he contended that the learned Judge had no power to alter the judgment at the trial; and, further, that the whole cause of action had really arisen within the limits of

the First Division Court of Middlesex, where the action ought have been brought, pursuant to 57 Vict. ch. 23 (O.), notwithstanding that the defendant resided in Quebec; and the learned Judge in awarding costs on the ground that the County Court alone had jurisdiction, had erred in principle, etc.

The first question is whether under the Rule of Court applicable to the case, and the conditions of the order of the 29th April, the County Court or any Superior Court in this Province had jurisdiction. If not, it will be unnecessary to consider the other objections, as, *a fortiori*, in that case no Division Court could have entertained the suit.

The action was brought to recover damages for the non-delivery of a quantity of empty oil barrels. The plaintiff is one Minhinnick, who carries on business in London, Ontario, under the name of the Empire Oil Company. The defendant is a merchant, residing and carrying on business in the city of Quebec.

By letters written on the 14th and 19th November, 1894, the parties contracted for the delivery of five hundred empty oil barrels by the defendant to the plaintiff. The defendant, writing at Quebec to the plaintiff in London on 16th November, proposed to sell five cars, containing, as assumed, five hundred barrels, at eighty-five cents per barrel. This letter was received and answered by the plaintiff at London, by a letter addressed to the defendant at Quebec, accepting his proposal in these terms: "We will take five cars of refined oil barrels from you at price quoted, eighty-five cents each, delivered here per G. T. R. sight draft." This was undoubtedly an agreement made in London, where the proposal of the defendant was received and answered, the letter of the plaintiff posted there being an acceptance of the proposal as soon as it was posted: *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216.

That contract was performed, but in the course of its performance, in answer to a question in a letter of the defendant, whether the plaintiff would require more than five cars empties, the plaintiff on the 4th December, 1894, wrote

the defendant: "We can take 500 more barrels from you. In each case we must have the car number or the bill before we can accept drafts. Advise if you accept offer for 500 more—same price as last." This letter, on its receipt by the defendant in Quebec, was the proposal to him there of the new contract. On the 11th December it was answered by the defendant in Quebec: "Your post card to hand. I forgot to state in my correspondence that I would ship four more cars empties, making up the 500 barrels named. They will follow the other five cars as soon as possible." On the previous day the plaintiff had addressed and mailed in London a post card to the defendant: "We wrote you on the 4th December, in reply to a letter asking if we would take any more barrels. We replied we would take 500, and for you to advise us. You have not replied to that." Whether this could have been the post card referred to by the defendant in his post card of the 11th December, considering the usual course of post between London and Quebec, is uncertain, but no other was proved to which the defendant's post card could have been a reply. But this seems immaterial, as the plaintiff's letter of the 4th December, and the defendant's post card of the 11th December accepting the proposal therein made, are clearly sufficient to constitute the new contract, even if we assume that the two post cards crossed each other in the post. This contract, however, applying to it the same principle as the other, was made in Quebec, where the plaintiff's proposal was made and accepted by the defendant. On the 13th the plaintiff wrote acknowledging receipt of the post card of the 11th, and saying: "You can ship along the 500 as soon as you have the present contract filled." It appears from the evidence that the second lot of 500 was to be shipped in four cars instead of five. The first contract was completed on the 26th December, 1894; and on 9th January, 1895, after some sharp correspondence between the parties on another subject, the defendant wrote the plaintiff refusing to carry out the second contract.

On the 19th February this action was commenced.

The Rule of Court, No. 1309, of September, 1894, substituting a new Rule 271, reads that, "Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a Judge whenever :—

"(e) The action is founded on any breach, or alleged breach, within the jurisdiction of any contract, wherever made, which is to be performed within the jurisdiction," etc.

The contract between the parties was made without the jurisdiction. The plaintiff must shew that it was to be performed within the jurisdiction in order to maintain the action. This, in my opinion, he has failed to do.

In the absence of express agreement, it is not implied that the vendor is to send or carry the goods to the vendee. It is sufficient if he have the goods so disposed that the vendee shall have the right of access to and control over them. If the contract express that the seller is to deliver the goods, this is construed to mean that he is to carry or send them to the buyer, but if he places them in the hands of a common carrier to carry them to the buyer, this is, in the ordinary case, a delivery within the meaning of the contract, the carrier being considered in such case the agent of the buyer and not of the seller: *Dunlop v. Lambert*, 6 Cl. & Fin. 600, 623; *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 322.

Taking the contract as expressed in the letters of the 4th and 10th December, 1894, and whether we read into it or not the plaintiff's letters of the 11th and 13th December, it seems clear that it was to be performed by the delivery of the oil barrels in question on board the cars of the railway company, consigned to the plaintiff. As soon as that was done, the specific goods would be ascertained, the property in them vested in the plaintiff, and the right to the price in the defendant: *Gilmour v. Supple*, 11 Moo. P. C. at p. 566. Delivery was to be made in Quebec, and the goods would be at the plaintiff's risk when placed on the cars. The plaintiff contends that the defendant had un-

dertaken not merely that the goods should be delivered to the carrier, but that they should be actually delivered at their destination, viz., in London. The contract in question, however, is not so expressed; and even if, as the plaintiff argued, we could read as part of it the terms of the plaintiff's letter of the 19th November, 1894, I doubt if that would sufficiently express an intention that the property should only vest and the price be payable on delivery in London. I think that letter does no more than point out where the goods were to be sent; and the provisions as to payment by sight drafts, and information for the purpose of enabling the plaintiff to claim shortage from the railway company in case of short delivery, are strong to shew that the barrels were to become the plaintiff's property when they were delivered on the cars.

The defendant's contract, therefore, was to have been performed in Quebec. The breach took place there and not within Ontario, and the cause of action was not one in respect of which service of the writ of summons out of the jurisdiction could properly be allowed under the Rule. The result is that the appeal must be allowed, and the action dismissed with costs.

The case of *Gildersleeve v. McDougall*, 6 A. R. 553, may be referred to.

HAGARTY, C. J. O., and MACLENNAN, J. A., concurred.

BROOKS V. GEORGIAN BAY SAW-LOG SALVAGE CO.

RUMLEY ET AL. V. GEORGIAN BAY SAW-LOG SALVAGE CO.

Referee—Report—Payment of Fees.

Upon a reference under sec. 102 of the Judicature Act, the referee apportioned the amount of his fees between the plaintiffs and defendants according to the time occupied by each upon the reference. The plaintiffs paid their share, but the defendants did not :—

Held, that the referee should issue his report to the plaintiffs without further payment by them, and look to the defendants for their share of his fees.

[November 23, 1895.—*The Master in Chambers.*]

MOTION by the plaintiffs in these actions for an order directing by whom the balance of the fees of the referee should be paid, and directing the referee to sign and issue his report.

The two actions were referred to a local Master for trial under sec. 102 of the Judicature Act.

The referee, for the purposes of the motion, certified as follows :—

That on 27th September, 1895, he made and sent to the solicitors for the plaintiffs and defendants, respectively, a statement of his fees and charges, amounting to \$191.50, which he apportioned between such solicitors, according to the time occupied by them respectively upon the reference, thus, \$94.40 to the plaintiffs' solicitor, and \$97.10 to the defendants' solicitor, but (for reasons stated) reduced the whole amount to \$160, and apportioned it evenly between the solicitors.

That the plaintiffs' solicitor had paid his share, \$80.

That the defendants' solicitor contended that he was not responsible for his share, \$80, and that the proper course for a referee to take in order to obtain payment of his fees, is to hold his report until his total fees are paid by whichever party chooses to take it up, as upon an arbitration.

That the plaintiffs' solicitor contended that the solicitors were personally responsible for such fees, just as for Mas-

ter's fees ; and that neither solicitor should be required to pay more than his proper share of such fees before taking up the report.

That he (the referee) had expressed his opinion that each solicitor was responsible for and should pay his own share of these fees ; but had declined to hand out his report until the question should be authoritatively settled by application to the Court.

The motion was argued before the Master in Chambers on the 20th November, 1895.

Kilmer, for the plaintiffs.

James Bicknell, for the defendants.

Judgment was delivered on the 23rd November, 1895.

THE MASTER IN CHAMBERS.—In my opinion, the referee cannot withhold the report from the plaintiffs in consequence of the refusal of the defendants to pay their proper share of the fees which were incurred at their request, and not in the interest or upon the request of the plaintiffs. He has his remedy against the defendants, and possibly their solicitors, but the plaintiffs should not be made to suffer for their neglect.

The report should be issued to the plaintiffs upon payment of the fees for which they are alone liable. Costs in the cause to the plaintiffs.

SMITH ET AL. v. HARWOOD.

Costs—Solicitor and Client—Action—Reference—Taxation—R. S. O. ch. 147, sec. 32—Costs of Unsuccessful Application—Costs Paid to Opposite Party—Counsel Fees—Quantum—Discretion.

By the judgment in an action it was ordered that the plaintiffs should recover against the defendant whatever amount should be found due to them on the taxation of their solicitors' bills of costs of certain litigation, as between solicitor and client, and certain bills were referred for taxation between solicitor and client.

Upon appeal from the taxation :—

Held, that it was to be treated as if it had been directed on an application, under sec. 32 of the Solicitors' Act, R. S. O. ch. 147, by the defendant as the person chargeable, and was a taxation between the solicitors and their clients, the plaintiffs.

2. That the decision of the taxing officer allowing to the solicitors the costs of an unsuccessful interlocutory application, undertaken in the exercise of an honest and fair discretion, should not be interfered with.
3. That the payment by the solicitors to the opposite party in the litigation of a sum for interlocutory costs which the plaintiffs were ordered to pay, while not properly such a disbursement as should be included in the bill of the costs of the action, was a proper payment on behalf of the clients, to which payments credited on the reference might have been applied, and should be treated as so applied.
4. That, notwithstanding the provisions of the tariff, the taxing officer was justified in taxing larger counsel fees upon this taxation than had already been allowed between solicitor and client for the same services, and that his discretion as to the amount thereof should not be interfered with.

Re Geddes and Wilson, 2 Ch. Chamb. R. 447, followed.

[July 17, 1895. —*Meredith*, C.J.]

AN appeal by the defendant from a report of the deputy-clerk of the Crown at Hamilton.

By the judgment it was ordered and adjudged that the plaintiffs should recover against the defendant whatever amount should be found due to them on the taxation of their solicitors' bills of costs of and incidental to the litigation mentioned in the pleadings, as between solicitor and client, and the bills of costs and disbursements referred to in the pleadings were referred to the deputy-clerk to tax them between solicitor and client, and to fix the amounts due thereunder; and the report appealed from was made in pursuance of this reference.

The appeal was heard by MEREDITH, C. J., in Court, on the 20th June, 1895.

J. Bicknell, for the defendant.

O'Heir, for the plaintiffs.

Judgment was delivered on the 17th July, 1895.

MEREDITH, C. J.—Numerous objections to various items allowed on the taxation were taken upon the argument of the appeal, and most of them were then disposed of.

The items remaining to be dealt with consist of (1) the costs of an unsuccessful application to vary the interpleader order; (2) \$58.84 paid by the plaintiffs' solicitors to the other side for their costs in respect of that application, which the plaintiffs were ordered to pay; (3) counsel fees which were allowed at higher sums than were allowed on the taxation between party and party.

The taxation, though at the instance of the defendant, is as between the solicitors and their clients, not as between the solicitors and the defendant, if, as it appears to me looking at the terms of the reference, it is to be treated as if the taxation had been directed on an application by the defendant as the person chargeable, under sec. 32 of the Act respecting solicitors, R. S. O. ch. 147: *Morgan on Costs*, 2nd ed., p. 460, and cases there cited.

With regard to the first item, I cannot say that the solicitors did not undertake the prosecution of the appeal in the exercise of an honest and fair discretion, especially as in so deciding I should be interfering with the decision of the deputy-clerk, which I ought not to do unless he has clearly come to a wrong conclusion; and I am of opinion that it cannot be said, on the facts of this case, that the proceeding was an unauthorized one: see *Con. Rule 1215*.

As to the second item, while it is not properly such a disbursement as should be included in the bill of the costs of the action: *Morgan on Costs*, pp. 427 and 474; *Re Remnant*, 11 Beav. 603: it was a proper payment on behalf of the clients, and the payments which were credited to the

defendant on the reference might properly have been applied to it, and on the appeal I will treat them as so applied, and the same result will be arrived at as was reached by the deputy-clerk.

The counsel fees are the only other items with which I have to deal.

It is difficult on principle, and having regard to the language of the tariff which provides for a "general allowance for plaintiffs and defendants as well between solicitor and client as between party and party," to justify the allowance for the same service in a matter for which provision is made by the tariff, of one sum when the taxation is between party and party, and a larger sum when it is between solicitor and client; and, with the single exception of counsel fees, the rule is that no greater fee can be taxed for business for which the tariff makes provision, between solicitor and client than upon a taxation between party and party: see *Re Geddes and Wilson*, 2 Ch. Chamb. R. 447; *Re Totten*, 8 P. R. 385. But, as said by Vice-Chancellor Mowat in the former case, the exception as to counsel fees "was made very early in the history of the Court, and has ever since been recognized;" and it is still I find the practice in the taxing offices. That being so, the amount of the fees was a matter in the discretion of the taxing officer, and I ought not to interfere.

This objection, therefore, as well as the others, has failed, and the appeal must be dismissed with costs.

PAYNE V. COUGHELL ET AL.

Indemnity—Third Party Procedure—Breach of Contract—Rule 328.

Rule 328 (1313) applies only to claims to indemnity as such, either at law or in equity, and does not apply to a right to damages arising from breach of contract, the latter being a right given by law in consequence of the breach of the contract between the parties, while the former is given by the contract itself.

Birmingham and District Land Co. v. London and North-Western R. W. Co., 34 Ch. D. 261, followed.

Page v. Midland R. W. Co., [1894] 1 Ch. 11, distinguished.

And where an action was brought against lessees of a road for a declaration that they had no right to exact tolls, etc., and the defendants claimed to be indemnified by their lessors upon the ground that the latter had warranted their title to the road by the lease :—

Held, not a case in which leave should be given to issue a third party notice.

[November 7, 1895.—*The Master in Chambers.*]

[November 22, 1895.—*Meredith, C. J.*]

AN application by the corporation of the county of Elgin to set aside a third party notice served upon the applicants by the defendants, and to set aside the *ex parte* order of the Master in Chambers permitting the defendants to serve the notice.

The action was brought by the plaintiff, on behalf of himself and all other subjects of Her Majesty who used or were entitled to use a road called the London and Port Stanley Road, to have it declared that the defendants had no right or authority to exact tolls on the road, or to obstruct it by placing toll-bars on it, for an order directing the defendants to remove these obstructions, for an injunction to restrain the defendants from hereafter demanding or exacting tolls for the use of the road, for damages, and for a return of tolls paid by the plaintiff on the 12th October, 1895.

The defendants' right to the road and to exact tolls from those using it was based upon a lease from the county corporation to one Robert Hepburn, whose assignees the defendants claimed to be, of the road and all the bridges and culverts thereon, and the toll-houses, toll-bars, weighing scales, tolls, rights, powers, privileges, and appurten-

ances to the same in any wise belonging, in like manner as the corporation then had the same, for the term of 199 years from 16th February, 1857; and the defendants claimed to be "indemnified" upon the ground that the county corporation warranted their title to the road by that lease.

The application was argued before the Master in Chambers on the 5th November, 1895.

W. H. Blake, for the applicants.

C. W. Kerr, for the defendants.

Judgment was delivered on the 7th November, 1895.

THE MASTER IN CHAMBERS.—For the municipal corporation of Elgin, who have been served with the third party notice, it is contended that there is no indemnity, implied or express, given by the lease in question; that, on the contrary, the lessee mentioned in it thereby expressly covenanted to save the municipal corporation harmless from all costs and damages which they might sustain by reason of the lessee exercising all the authority vested in them in respect to the road, which he, the lessee, might conceive for his benefit.

In my opinion, there are implied covenants on the part of the municipal corporation under the lease in question, both for quiet enjoyment and for title; under these implied covenants, the claim for indemnity is made; that claim is one to be disposed of by trial, and not in Chambers. A *primâ facie* case of indemnity is all that is required to be made out on the application for a third party notice, and I think in this case that has been done. Whether the third parties have a good defence to the claim against them, I cannot inquire.

In my opinion, the notice was properly issued, and this application must be refused. Costs in the cause to the defendants as between them and the third parties.

The corporation of the county of Elgin appealed from this decision of the Master, and their appeal was argued by the same counsel before MEREDITH, C. J., in Chambers, on the 15th November, 1895.

Judgment was delivered on the 22nd November, 1895.

MEREDITH, C. J.—(after setting out the facts as above)—The question involved in the appeal is whether this claim is “a claim to indemnity” within the meaning of Con. Rule 1313.*

The language of the corresponding English Rule has been considered in several cases, and it has been determined by the Court of Appeal that it applies only to claims to indemnity as such, either at law or in equity, and does not apply to a right to damages arising from breach of contract, the latter being a right given by law in consequence of the breach of the contract between the parties, while the former is given by the contract itself: *Birmingham and District Land Co. v. London and North-Western R. W. Co.*, 34 Ch. D. 261; Snow’s Annual Practice, 1895, p. 420; see also *The Jacob Christensen*, [1895] P. 281; *Baxter v. France*, [1895] 1 Q. B. 591.

In *Page v. Midland R. W. Co.*, [1894] 1 Ch. 11, the defendants were allowed to bring in as a third party their vendor, who had covenanted with them for title to and quiet enjoyment of the premises in respect of which the plaintiff’s claim was made; but in that case no question appears to have been raised as to the applicability of the Rule, and the covenants, it will be observed, contained what it appears to have been assumed was an express agreement to indemnify.

*1313.—Rules 328, 329, 330, 331, and 332 are rescinded and the following substituted therefor:

“328. Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the Court or a Judge, issue a notice (hereinafter called the third party notice) to that effect. * * *.”

The cases referred to appear to me conclusive against the defendants' contention.

It is not, therefore, necessary to consider the other objections urged by Mr. Blake.

The appeal must, therefore, be allowed with costs, and the order of the Master in Chambers discharged, and the defendants must pay the costs of the application to him.

ASHCROFT V. TYSON ET AL.

Security for Costs—Action for Penalty—Rule 1244—Time—Default—Dismissal of Action—Indulgence—Merits.

An order under Rule 1244 for security for costs in an action for a penalty may properly contain provisions limiting the time for giving security and for dismissal of the action, without further order, upon default; and such an order, not appealed against, is conclusive between the parties as to all its terms.

Thompson v. Williamson, 16 P. R. 368, distinguished.

The action was brought against justices of the peace to recover a penalty for non-return of a conviction of the plaintiff, the error of the defendants being merely clerical, and one not prejudicing the plaintiff:—

Held, not a case in which the indulgence of extending the time for giving security should be granted to the plaintiff.

[December 10, 1895.—*Boyd*, C.]

AN appeal by the defendants from an order of the Master in Chambers made on the 27th November, 1895, upon the plaintiff's application for an extension of the time for putting in security for the defendants' costs of the action.

The plaintiff's claim was to recover the penalty of \$80 imposed by the statute in that behalf upon the defendants as two of Her Majesty's justices of the peace for non-return of a conviction made by the defendants whereby the plaintiff was convicted of assault.

On the 21st September, 1895, an order was made under Rule 1244, upon the application of the defendants, (1) requiring the plaintiff, within four weeks, to give security

in the sum of \$400 to answer the defendants' costs in the action, and staying all proceedings in the meantime; and (2) directing that, in default of such security being given within the time limited, the action should stand dismissed with costs, without further order, unless the Court or Judge, upon special application for that purpose, should otherwise order.

By the Master's order of the 27th November, 1895, he amended his former order by striking out of the first clause the words "within four weeks," and by striking out the whole of the second clause.

The plaintiff did not give security within the time limited by the original order.

The defendants' appeal was argued before BOYD, C., in Chambers, on the 9th December, 1895.

Kilmer, for the defendants. The Master had jurisdiction under Rule 1246 to make his original order, but had no jurisdiction to alter it, under Rule 536 or otherwise. Not being appealed against, it was conclusive. This was an action for a penalty, and the right to security depended, not, as in *Thompson v. Williamson*, 16 P. R. 368, upon the statute, but upon Rule 1244; and Rules 1245 and 1246 apply to an order made under Rule 1244. The plaintiff is out of Court, and the time should not be extended in an action of this kind: *O'Reilly v. Allan*, 11 U. C. R. 411; *McLellan v. Brown*, 12 C. P. 542; *McClenaghan v. McLeod*, 3 P. R. 13; *Miles v. Roe*, 10 P. R. 218.

Douglas Armour, for the plaintiff. If the case comes within Rule 1246 at all, a further application to dismiss is necessary under sub-Rule (a). The order was, at all events, wrong in that respect, and the Master had jurisdiction to correct it as one made by mistake: *McMaster v. Radford*, 16 P. R. 20. The plaintiff's application was to extend the time for putting in security; the Master has virtually extended the time; the plaintiff has now filed a bond; and the discretion exercised, should not be interfered with.

Judgment was delivered on the following day.

BOYD, C.—It was competent for the Master to make the order of 21st September in the shape it was originally, and, not being appealed from, it was conclusive between the parties as to all its terms. I do not read the case of *Thompson v. Williamson*, 16 P. R. 368, as ruling the practice under Rule 1244. In that case the Court decided upon their view of the limited scope of the statute, but the reason of the decision is not to be extended to the construction of one of a group of Rules relating to security for costs. In all cases falling under the Rules the like practice obtains, and it would be excessively inconvenient to have a number of actions suspended indefinitely because security had not been given, and apparently no provision to end them as against the dormant plaintiff.

Therefore, under the order of September, the action was out of Court, because no security was given. Then the question arises whether further time should be given in order that its terms might be complied with. This is not, in my opinion, a case for such indulgence. The slip of the defendants in making the return of the conviction was little more than clerical, and not affecting or prejudicing the plaintiff in the slightest. The defendants acted in substantial, though it may be irregular, compliance with the statute. The action, besides, is of a penal character, not encouraged by the Courts, in which the balance of judicial discretion should not be weighted against officers of the law who meant to do their duty. The appeal is allowed with costs.

WHEELER V. WHEELER.

Writ of Summons — Service out of Jurisdiction — Alimony — Contract — Marriage—Law Courts Act, 1895, sec. 28.

The right to alimony is not based on contract, but on the special statutory provisions now found in sec. 29 of the Judicature Act, R. S. O. ch. 44. Alimony, when granted, is not to be classed either as "debt" or "damages," terms which define the scope of sec. 28 of the Law Courts Act, 1895, providing for the allowance of service out of the jurisdiction of a writ of summons where the plaintiff has a good cause of action upon a contract, and the defendant has assets in Ontario: it is that allowance to which a married woman is entitled upon separation from her husband.

Magurn v. Magurn, 3 O. R. 579; *Keith v. Keith*, 25 Gr. 113; and *Hooper v. Hooper*, 3 Sw. & Tr. 256, followed.

Service of writ of summons out of the jurisdiction in an action for alimony disallowed.

[December 10, 1895.—*Boyd, C.*]

AN appeal by the plaintiff from an order of the local Judge at Brantford setting aside his own *ex parte* order allowing the plaintiff to issue a writ of summons for service out of the jurisdiction upon the defendant in an action for alimony, and setting aside the writ issued and the service made thereunder. The defendant was a British subject resident in the State of New York, where also he was resident at the time of the marriage, which took place at Paris, in the Province of Ontario, on the 14th April, 1894, where the plaintiff, also a British subject, was then domiciled. It was sworn by the plaintiff that the defendant had assets in Ontario to the value of \$200 at least.

By sec. 28 of the Law Courts Act, 1895, 58 Vict. ch. 13 (O.), it was provided as follows:—

"Service out of the jurisdiction of a writ of summons
* * may be allowed by the Court or a Judge where the action is not for any matter within any of the classes for which service out of the jurisdiction is now provided, but it appears to the satisfaction of Court or Judge that the plaintiff has a good cause of action against the defendant upon a contract or judgment and that the defen-

dant has assets in Ontario of the value of \$200 at least, which may be rendered liable to the judgment in case the plaintiff should recover judgment in the action * *."

The appeal was argued before BOYD, C., in Chambers, on the 9th December, 1895.

Watson, Q. C., for the plaintiff, contended that the marriage was a contract upon which the plaintiff had a good cause of action, citing *Crawley on Husband and Wife*, p. 21; *Story's Conflict of Laws*, 8th ed., p. 143; *Hyde v. Hyde*, 1 P. & D. 130.

Wilkes, Q. C., for the defendant, contended that marriage was a status, not a contract, and that the statute was not retroactive.

Judgment was delivered on the following day.

BOYD, C.—The appeal is upon the question whether an action for alimony is within the meaning of the Law Courts Act, 1895, sec. 28, so as to warrant an order being made for service out of the jurisdiction. The right to alimony no doubt arises out of the fact of marriage, and marriage is no doubt a matter of contract. But it is much more than a mere civil contract, and, as pointed out in *Magurn v. Magurn*, 3 O. R. at p. 577, it differs from other contracts in this, that the rights, obligations, and duties arising from it are in many respects matters of municipal or statutory regulation, over which the parties have no control. Hence it is that the right to alimony is not based on contract, but on the special provisions of the Provincial statute which enables the Court to award interim and future alimony, apart from all other jurisdiction as to the matrimonial status (see Judicature Act, sec. 29.)

This alimony, when granted, is not to be classed either as "debt or "damages," terms which define the scope of sec. 28 of the Law Courts Act of 1895; but it is that allowance which a married woman is entitled upon separation from her husband: *Keith v. Keith*, 25 Gr. at p. 113. It is pointedly

decided by Willes, J., in *Hooper v. Hooper*, 3 Sw. & Tr. at p. 256, that alimony is not in the nature of damages; it is not measured by the degree of cruelty or suffering to which the wife may have been subjected by the husband. In all the Courts it is held that the wife does not obtain damages against her husband; no compensation is attempted on that footing, because alimony is granted for the purpose of giving the wife a subsistence: *ib.*

The order of His Honour Judge Jones is right, and it stands affirmed with costs.

HUNTER V. STARK.

Counterclaim—Recovery of Land—Joinder of Causes of Action—Rule 341—Mortgage Action—Leave.

A counterclaim for the recovery of land is an action for the recovery of land, within Rule 341 as to joinder of causes of action.

Compton v. Preston, 21 Ch. D. 138, followed.

And a counterclaim for foreclosure and recovery of possession of mortgaged premises is within the exception contained in Rule 341 (a).

And where the plaintiff sought a mortgage account and redemption, and the defendant counterclaimed for foreclosure and possession:—

Held, that if leave were necessary, it was a proper case for granting it, the rights being correlative.

[December 10, 1895.—*Boyd, C.*]

THIS was an action brought by Edward Hunter against John Stark for a mortgage account and for redemption. The defendant delivered a counterclaim against the plaintiff and Mary Ann Hunter, his wife, asking for foreclosure and for possession of the mortgaged lands, etc.

The plaintiff and Mary Ann Hunter moved for an order or judgment of reference to take the accounts, etc., and moved at the same time to strike out the counterclaim, or so much thereof as asked for foreclosure and possession.

Rule 341, as amended by Rule 1315, is as follows: "No cause of action shall, unless by leave of the Court or a Judge, be joined with an action for the recovery of land,

except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or for specific performance, or for an injunction or receiver in respect of the said lands, or the rents and profits thereof, or any part thereof, and damages for breach of any contract under which the same or any part thereof are or is held, or for any wrong or injury to the premises claimed.

“(a) Nothing in these Rules contained shall prevent any plaintiff in an action of foreclosure or redemption, or for the immediate payment of the mortgage moneys, from asking for or obtaining a judgment or order against the defendant for delivery of the possession of the mortgaged property to the plaintiff * *, and such an action shall not be deemed an action for the recovery of land within the meaning of the Rules.”

The motion was argued before BOYD, C., in Court, on the 10th December, 1895.

B. E. Swayzie, for the applicants.

Heighington, for the defendant.

Judgment was delivered on the same day.

BOYD, C.—It is decided that under Rule 341, as to joinder of causes of action, both claim and counterclaim are included; it is difficult, says Fry, J., to see “why a counterclaim for the recovery of land is not an action for the recovery of land:” *Compton v. Preston*, 21 Ch. D. 138, 142. By parity of reason, our amended Rule 341 (a), excluding actions on mortgages from the operation of the first clause of the Rule, applies equally to claims and counterclaims. The result is that one rightly counterclaiming in respect of a mortgage can ask for all the remedies incident to the position of a mortgagee, without contravening the practice of the Court. This, besides, is a case in which the mortgage accounts are asked to be taken by the plaintiff, and he offers to pay what is due; it is a merely correlative right that the defendant should

ask foreclosure and possession in case the plaintiff fails to redeem. If leave were needed, it is just such a case as the Court would facilitate in having disposed of in one action, and on one record. As expressed by Street, J., in *Pritchard v. Pritchard*, 17 O. R. 53, "the whole matter appears to arise out of one connected series of transactions which should be tried at the same time;" and there he granted leave to include all in one counterclaim.

The matters of account in question are, by consent, sent for disposal to an officer of the Court under sec. 106, and if the parties cannot unite in the choice, the Master in Ordinary is the proper officer.

Costs of this appeal are in the cause, except as to the striking out, which are to the defendant in any event.

RE GALWAY.

Devolution of Estates Act—Widow—Dower—Election—Money in Court.

Where a widow desires to take, under the Devolution of Estates Act, her interest in the proceeds of her husband's undisposed of real estate, in lieu of dower, she must so elect by an attested instrument in writing, pursuant to sec. 4, sub-sec. 2, even where the lands have been sold under an order of the Court at her instance, free from her dower, and the proceeds are in Court.

[December 10, 1895.--*Boyd, C.*]

A PETITION was presented on behalf of infants by their mother and next friend, under R. S. O. ch. 137, sec. 3, for an order for the sale of certain real estate to which the infants were entitled, subject to their mother's dower. The infants' father, who died intestate, was entitled to the lands at the time of death.

An order was made for sale free from the dower, the lands were sold, and the purchase money was paid into Court. The mother, being before the Court and represented by a solicitor, asked to have one-third of the moneys

in Court paid out to her, in lieu of dower, though she had not executed any instrument in writing signifying her election.

R. S. O. ch. 108, sec. 4, sub-sec. (2), provides that " Nothing in this Act shall be construed to take away a widow's right to dower ; but a widow may by deed or instrument in writing, attested by at least one witness, elect to take her interest under this section in her husband's undisposed of real estate, in lieu of all claims to dower in respect of real estate of which her husband was at any time seised, or to which at the time of his death he was beneficially entitled ; and unless she so elects, she shall not be entitled to share under this section in the undisposed of real estate aforesaid."

F. W. Harcourt, for the infants, asked for a direction as to whether the widow could elect without an instrument in writing.

W. H. Blake, for the widow, contended that she being before the Court, the sale having been free from her dower, and the money being in Court, she could make her election through her solicitor, and it could be expressed in the order for payment out.

BOYD, C., held that the statute must be complied with by the production of an attested instrument in writing signifying her election.

Direction accordingly.

REES V. CARRUTHERS.

Settlement of Action—Dispute—Summary Trial—Stay of Proceedings—Costs.

The Court has jurisdiction to stay proceedings in any action which has been compromised, where no terms of the compromise go beyond what is in controversy in the action.

And where, in an action of slander, the plaintiff excused his non-prosecution by alleging that an agreement had been entered into between himself and the defendant by which the action was to be dropped and \$10 costs to be paid by the defendant, which agreement was denied by the defendant, an order was made directing a summary trial, or the trial by an issue upon oral evidence, of the question of the validity of the settlement; if the result should be a valid settlement, proceedings to be stayed perpetually and costs paid by defendant; if settlement invalid, action to be dismissed with costs to defendant.

[December 14, 1895.—*Boyd*, C.]

AN appeal by the defendant from an order of the Master in Chambers, made upon a motion by the defendant to dismiss the action for want of prosecution, allowing the plaintiff to amend by setting up an alleged settlement of the action, which settlement was denied by the defendant, and directing the trial of the action and of the question to be raised by the amendment at the next sittings. The facts are stated in the judgment.

The appeal was argued before *BOYD*, C., in Chambers, on the 13th December, 1895.

W. H. Blake, for the defendant.

Douglas Armour, for the plaintiff.

Judgment was delivered on the following day.

BOYD, C.—This action of slander has long been at issue, and has not been prosecuted because the plaintiff relies on a settlement made on behalf of the defendant about 20th October, 1894. On this ground the local Judge, in May, 1895, refused a motion made by the defendant to dismiss the action for want of prosecution.

Thereupon the defendant caused a letter to be written on 14th May to the plaintiff, in which he repudiated the

alleged settlement, and stated that further delay would be at the plaintiff's peril.

Nothing further being done, the plaintiff in effect elected to abide by the settlement. Then the defendant again moves to dismiss for want of prosecution, and the Master in Chambers has made an order in effect amending the pleadings by setting up the alleged settlement and directing the trial of the action, and of this further and preliminary question at the next Assizes. From this the defendant appeals.

The proper practice to be observed in this case is provided for by the Judicature Act, under section 52 (9) and (12), and it is briefly this: that the Court has jurisdiction to stay proceedings in any action which has been compromised, where no terms of the compromise go beyond what is in controversy in the action. Here the action was to be dropped and \$10 costs to be paid by the defendant. Upon this the plaintiff has based his inaction; and on this he is content to let the matter rest. The only matter to be tried is, settlement or no settlement, as neither party wishes to go to trial of the action. Now, the collateral point may be either disposed of in a summary way, or, if either party so desires, by an issue on which *viva voce* evidence can be given. If the result is a valid settlement, there should be a perpetual stay of proceedings, and costs to be paid by defendant; if the settlement is invalid, the action should be dismissed with costs to the defendant.

I modify the order under appeal to accomplish this result. Costs to be dealt with when the settlement question is disposed of. For authority, I note the cases of *Eden v. Naish*, 7 Ch. D. 781, and *Scully v. Dundonald*, 8 Ch. D. 658, which were not before Osler, J., when he decided *McAlpine v. Carling*, 8 P. R. 171. This practice is really a modernization of the old rule of the Courts as expressed in such cases as *Roadnight v. Carter*, 3 Sw. & Tr. 421, and *Rowe v. Wood*, 1 J. & W. 315.

MUNRO V. ORR.

Summary Judgment—Rule 739—Unconditional Leave to Defend.

Rule 739 was made to prevent defences being set up against good faith for the mere purpose of gaining time. Where the defendant shews a good defence, he should be allowed to defend unconditionally.

Upon a motion for summary judgment under that Rule, in an action upon the covenant for payment in a mortgage, the defendant swore that he had a good defence on the merits, and that the mortgage was signed by him on the express understanding that he was not to be personally liable. This was supported by the affidavit of another person; and it also appeared that the blanks in the printed form of covenant contained in the mortgage had not been filled up:—

Held, that the defendant should have unconditional leave to defend.
Judgment of BOYD, C., reversed.

[December 13, 1895.—*The Chancery Division.*]

AN appeal by the defendant from an order of BOYD, C., in Chambers, affirming an order of the Master in Chambers, made upon a motion for summary judgment under Rule 739, allowing the defendant to defend the action upon condition of his paying \$200 into Court, and in default of such payment, allowing the plaintiff to sign judgment. The facts are stated in the judgment.

The appeal was argued before a Divisional Court composed of FERGUSON and ROBERTSON, JJ., on the 12th and 13th December, 1895.

George P. Deacon, for the defendant.

Worrell, Q. C., for the plaintiff.

Judgment was delivered at the close of the argument.

ROBERTSON, J.—This is an appeal from an order of the Chancellor affirming an order of the Master in Chambers allowing the defendant conditionally to defend an action on a covenant contained in a charge on lands under the Land Titles Act, which charge is said to be in a mortgage expressed to be under the Act respecting Short Forms of Mortgages. The covenant to pay the mortgage money is in blank, that is, the spaces in the printed form left to be

filled up by the personal pronoun indicating the party covenanting, are left blank. The plaintiff is the assignee of the mortgage, and he sues on the covenant only, and has specially indorsed his writ for the amount claimed, \$400 and interest. The defendant duly entered an appearance, but the plaintiff, under Rule 739, applied for an order to be allowed to sign judgment. The defendant opposed the motion and swore that he had a good defence on the merits, and further, what his defence was, and gave reasons for saying that his defence was substantial and would be sustained in evidence. The Master on this allowed the defendant to defend, but he imposed a condition precedent, that he should pay \$200 into Court, etc. The learned Chancellor has affirmed this, and the Divisional Court is now appealed to to set aside both these orders.

The Rule in question allows judgment upon an affidavit, made by a person who can swear positively to the debt or cause of action, stating that in his belief there is no defence to the action, unless the defendant, by affidavit or otherwise, satisfies the Court or Judge that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend the action.

The defendant here has brought himself, I submit with great respect, within the Rule. He swears positively that he has a good defence on the merits, and more, he states the nature of that defence, which is that it was represented to him on behalf of the mortgagee at the time the mortgage was executed, and before the same was executed, that the defendant was not to be personally responsible for the mortgage money; that the mortgagee agreed to look to the land only for the amount of the mortgage money; and there is some corroborative evidence of that fact; and the fact of the covenant being left blank is a circumstance pointed to. Moreover, it appears from statements made by counsel for both parties, and by the original agreement entered into by the defendant at the time of the sale, that the sale in question took place at

the time of what is generally known in Toronto as "the boom period," when scores of people had, so to speak, "lost their heads;" when land agents of the "gutter stamp," or "kerb-stone species," were employed by vendors to "boom the land," who were most unscrupulous in their statements, made to induce unwary individuals to purchase; and in this instance the articles of agreement say that in case of non-payment, the land may be resold, etc. The sale price was \$800, of which \$400 was paid, and in January, 1892, several years after the sale, the mortgage in question was given, when the representations as to the personal liability were made. Again, the mortgagee is a solicitor, and he it was who attended to cross-examine the defendant on his affidavit herein, although the plaintiff, who sues in person, is a solicitor also. And it also appears that the mortgage was assigned to the plaintiff on the 17th June, 1895, and the action was commenced on the 3rd July, 1895.

There may be nothing in these facts, but, taking the whole into account, it appears to me that the remarks of Mr. Justice Denman in *Ward v. Plumbley*, 6 Times L. R. 198, in regard to cases which arise out of stock transactions, apply with force to the circumstances surrounding this case. His Lordship says: "Such cases were peculiarly cases in which the Court should be very slow in allowing the plaintiff to take judgment without trial." And Mr. Justice Wills in the same case said: "He could not help concurring with those Judges who had said that, even though the case for the plaintiff appeared to be supported by documents and letters, yet it might be that there was a defence. And that if there was a fair probability of a defence, a defence ought to be allowed, without imposing the condition of payment of money into Court, for perhaps the defendant had, as in the case he had mentioned" (where a defendant had been allowed to defend on payment into Court of £1,000, which he was not able to do, and it afterwards appeared that he had a good defence, but was not able to set it up by reason of the condition, and the action

had caused the bankruptcy of the defendant, whose assignee disputed the plaintiff's claim successfully), "no money to pay; and if that were so, and he was deprived of the opportunity of defence, a poor man would, merely on account of his poverty, be put in a worse position than a rich one, which, as far as possible, should be avoided."

Now, it may be that when the case comes to be tried, the defendant will fail in establishing his defence by legal evidence; but before that can be determined, there must be a trial; the defendant has the right to call witnesses to the fact; the plaintiff may be able, by one means or another, to displace those facts; but, unless a Judge in Chambers is to be constituted a trial Judge in all such cases, it appears to me clear that the defendant is entitled to succeed on this appeal.

In *Runnacles v. Mesquita*, 1 Q. B. D. at p. 418, Cockburn, C. J., says: "This is the commencement of a new system (1876), and of a practice, hitherto only applicable to bills of exchange, superseding the ordinary forms of law where the defendant's liability has to be made out by evidence. And I think we must not hesitate to establish a precedent that, when the defendant goes beyond the mere form of stating that he has a good defence, and states what his defence is, and gives reasons for thinking that his defence is substantial and will be sustained in evidence, the defendant ought not to be compelled to pay money into Court as a condition to his being allowed to come in and defend the action."

In the present case the defendant does more than state he has a good defence on the merits; he makes affidavit that the mortgage was signed by him on the express understanding that there was to be no personal liability. He supports this by the affidavit of another person, and he is naturally desirous to submit the matter to a competent tribunal, and I think he should have this opportunity without being compelled to pay money into Court. The fact of giving the defendant leave to defend, subject to the condition imposed, shews that, in the opinion of the

Master in Chambers, the defendant had a defence. That being so, why should he not be allowed to set it up, without being hampered by a condition that he must pay half the amount of the plaintiff's claim into Court? As in the case referred to by Mr. Justice Wills, it may be impossible for him to do so, at all events without great inconvenience. I can see no reason for it. The moment that the Court or Judge is satisfied that the defendant "discloses such facts as may be deemed sufficient to entitle him to defend the action," that moment the motion for judgment should be discharged.

I am satisfied that the Rule invoked by the plaintiff here has more than once been extended beyond what was originally intended, which was to prevent defences being set up against good faith for the mere purpose of gaining time. I am, therefore, with great deference, of the opinion that the appeal should be allowed, and the original order set aside, with costs below and the costs of this appeal to be costs in the cause to the defendant in any event of the action.

FERGUSON, J.—I concur in the conclusion come to by my brother Robertson.

PORT ELGIN PUBLIC SCHOOL BOARD V. EBY ET AL.

Judgment—Power of Judge to Vary—Costs.

The judgment of the trial Judge; not drawn up or entered, but indorsed upon the record, was in favour of the plaintiffs against all three defendants with costs, but was afterwards reversed as to two defendants by a Divisional Court. Subsequently, the other defendants moved the trial Judge to vary his judgment against them as to costs in accordance with what they considered should have been the judgment, had it been against them alone, and in favour of the other defendants, they being administrators, and an administration order having been made before the trial. The judgment, as pronounced, expressed precisely what the trial Judge intended; there was no clerical error, inadvertence, or oversight:—

Held, that the Judge had no power to vary his judgment.

[December 12, 1895.—*Ferguson, J.*]

A MOTION by the defendants the Trusts Corporation of Ontario to vary the judgment pronounced by FERGUSON, J., on the 29th May, 1894.

The action was brought against these defendants as administrators of the estate of one Ruby, deceased, and against the other two defendants, Eby and Carroll, as his sureties upon a bond for the due performance of his duties as treasurer of the plaintiffs, to recover moneys alleged to have been received by him in his lifetime for the plaintiffs and not paid over.

Pending the action and before the trial the defendants the Trusts Corporation obtained an order for the administration of the estate of Ruby, and then moved to stay proceedings against them in this action, upon which motion MACMAHON, J., made an order allowing the action to proceed and the plaintiffs to bring their judgment, if they should obtain one, into the administration proceedings as proof of their claim therein.

The action was tried before FERGUSON, J., who gave judgment in favour of the plaintiffs against all the defendants with costs.

Upon motion of the defendants Eby and Carroll, this judgment was reversed and the action dismissed with costs

as against them by a Divisional Court of the Queen's Bench Division: 26 O. R. 73.

The defendants the Trusts Corporation now moved to vary the judgment pronounced by FERGUSON, J., so as to give the plaintiffs costs against them only up to the time the plaintiffs had notice of the administration order.

The judgment in question had not been drawn up or entered, but a direction for its entry had been indorsed by the Judge upon the record.

The motion was argued before FERGUSON, J., in Chambers, on the 9th December, 1895.

Moss, Q. C., for the defendants the Trusts Corporation, contended that they should not be compelled to pay more costs than would have been payable by them if they had been the only defendants. The action was allowed to proceed against them after the administration order because there were other defendants. If the judgment which the Divisional Court held was the proper judgment, had been pronounced at the trial, the costs would, no doubt, have been then limited as these defendants now suggest. The disposition of the costs against these defendants was not touched by the order of the Divisional Court; it was for the trial Judge to deal with it; and his judgment, not having been drawn up or entered, could now be varied so as to do justice.

Shepley, Q.C., for the plaintiffs, contended that there was no power to vary the judgment now. The applicants should have made a motion to the Divisional Court, when the other defendants were moving there, to vary the judgment in the event of the other defendants succeeding.

The cases referred to by counsel are cited by the learned Judge.

Judgment was delivered on the 12th December, 1895.

FERGUSON, J.—The judgment pronounced by me expressed precisely what I intended. There was no clerical

error, inadvertence, or oversight. True, this judgment has not, as I am told, been drawn up or entered, but there was an appeal from it to the Queen's Bench Division, the result of which was to vary the judgment materially, the action being dismissed as against two of the then defendants, my judgment being for the plaintiffs against all these defendants with costs. The defendants against whom my judgment stands are administrators, and pending the action an administration order was made, whereupon a motion was made to stay the proceedings in the action. My brother MacMahon made an order that the action might proceed, and that the plaintiffs should bring their judgment (should they obtain one) into the administration proceedings as proof of their claim therein. The reason for that order was the fact of there being the other two defendants, those against whom the action was dismissed by the Queen's Bench Division.

I am now asked to vary my judgment so as to give the plaintiffs costs against the administrators only to the time of notice of the administration order, that is, to make another order as to costs differing greatly from the one that I did make.

I have perused the cases *Preston Banking Co. v. Allsup*, [1895] 1 Ch. 141; *Fritz v. Hobson*, 14 Ch. Div. 542; *Lawrie v. Lees*, 7 App. Cas. 19, 34, 35; *Milson v. Carter*, [1893] A. C. 638; *Re St. Nazaire Co.*, 12 Ch. D. 88; *Smith v. Smith*, 7 P. D. 84, 92, 93; *Macdonell v. Baird*, 13 P. R. 331; *Canadian Land, etc., Co. v. Dysart*, 9 O. R. 495, 512; and *Hardy v. Pickard*, 12 P. R. 428: and I have made some search for other cases bearing on the subject.

The conclusion at which I have arrived is that I have no power to make the order that is asked or to vary in any respect the judgment that I delivered in the action, and for this reason I must refuse the application.

If costs are asked, I suppose they must follow the event.

REGINA V. VERRAL.

Evidence—Prosecution for Indictable Offence—Foreign Commission—Order for—Time—Use of Evidence—Criminal Code, sec. 683.

An order for a commission, under sec. 683 of the Criminal Code, to take the evidence of any person residing out of Canada who is able to give material information relating to an indictable offence, or to any person accused thereof, may be made at any time after an information has been laid charging such offence, and such evidence may be used at any stage of the inquiry at which evidence may be given.

Decision of MACMAHON, J., 16 P. R. 444, affirmed, but the order issued thereon varied.

[December 14, 1895.—*The Queen's Bench Division.*]

AN appeal by the defendant from the order of MACMAHON, J., in Chambers, 16 P. R. 444, allowing the Crown to issue a foreign commission to take the evidence of one Otto E. C. Guelich, at the city of Detroit, in the State of Michigan, for use upon the preliminary hearing before the police magistrate for the city of Toronto of a charge against the defendant of an indictable offence under sec. 136 of the Criminal Code.

The order, as issued, provided that the commission and depositions taken under it should be transmitted by the commissioner to the police magistrate, and should be admitted to be read and given in evidence at the investigation before him.

The appeal was argued before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 29th November, 1895.

Biggs, Q. C., for the defendant.

J. W. Curry, for the Crown.

On the 14th December, 1895, the judgment of the Court was delivered by

ARMOUR, C. J.—Section 683 of the Criminal Code is merely an extension of the provision made by section 681 for procuring the evidence of a person dangerously ill and

not likely to recover from such illness, to the procuring of the evidence of a person residing out of Canada, and it is desirable, therefore, to shew the origin of section 681 in order to ascertain the proper application of section 683.

Section 681 had its origin in 43 Vict. ch. 35, the preamble of which was as follows: "Whereas it may happen that a person dangerously ill and unable to travel may be able to give material and important information relating to an indictable offence, or to a person accused thereof; and it is desirable in the interests of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same."

Reading then the provisions of section 681 in the light of this preamble, it is clear that the statement for the taking of which provision is therein made may be used at any stage of the inquiry relating to an indictable offence as evidence relating to such offence, or relating to any person accused of any such offence.

Such statement, if it relates to any indictable offence for which any accused person is already committed or bailed to appear for trial, is to be transmitted to the proper officer of the Court at which such accused person is to be tried; and in every other case is to be transmitted to the clerk of the peace of the county, division, or city in which it has been taken, or to such other officer as has charge of the records and proceedings of a superior court of criminal jurisdiction in such county, division, or city, and such clerk of the peace or other officer is to preserve the same and file it of record, and upon the order of the court or of a judge is to transmit the same to the proper officer of the court where the same shall be required to be used as evidence.

Section 683, as amended by 58 & 59 Vict. ch. 40, reads as follows: "Whenever it is made to appear, at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of the judge of any superior court, or the judge of a county court having criminal jurisdiction, that any person who resides out of Canada is able to give material

information relating to any indictable offence for which a prosecution is pending, or relating to any person accused of such offence, such judge may, by order under his hand, appoint a commissioner or commissioners to take the evidence, upon oath, of such person.

2. Until otherwise provided by rules of court, the practice and procedure in connection with the appointment of commissioners under this section, the taking of depositions by such commissioners, and the certifying and return thereof, and the use of such depositions as evidence, shall be as nearly as practicable the same as those which prevail in the respective courts in connection with like matters in civil causes.

3. The depositions taken by such commissioners may be used as evidence as well before the grand jury as at the trial."

The time at which an order may be applied for under section 683 does not differ from the time at which an order may be applied for under section 681. Under the former it is whenever it is made to appear, at the instance of the Crown or of the prisoner or defendant, that any person who resides out of Canada is able to give material information relating to any indictable offence for which a prosecution is pending or relating to any person accused of such offence; and under the latter it is whenever it is made to appear, at the instance of the Crown or of the prisoner or defendant, that any person who is dangerously ill, and who, in the opinion of some licensed medical practitioner, is not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of such offence.

The evidence to be given in the former case is of a person who is able to give material information relating to any indictable offence for which a prosecution is pending, or relating to any person accused of such offence; and in the latter of a person who is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence.

The kind of evidence to be given in each case is substantially the same; it must relate to an indictable offence, or to any person accused of such offence; and the words "for which a prosecution is pending" do not, in my opinion, differ section 683 from section 681.

The order in this case, made under section 683, was, in my opinion, applied for and obtained at a proper time, and under circumstances warranting the application for and obtaining it.

The use to be made of the evidence to be procured under it cannot at all affect the validity of the order for procuring it.

We think, however, that it may be used in the same manner and at the same times as evidence may be used procured under an order under section 681.

The time at which and the circumstances under which the order may be applied for and obtained, all tend to shew that the evidence procured under it may be used at any stage of the inquiry at which evidence may be given relating to the offence or to the person accused of the offence.

The evidence is taken in the "prosecution pending," and being so taken, it is difficult to see how it could be rejected at any stage of the inquiry at which evidence may be taken; and we do not think that the provision enabling it to be used as well before the grand jury as at the trial prevents its being used at any other time, if required.

We think, however, that the order ought to provide that the commission be returned into this Court, and ought not to limit the use of the evidence.

The appeal will be dismissed with costs.

Regina v. Chetwynd, 23 Nova Scotia 332; *Regina v. Gibson*, 16 O. R. 704; Imperial Act 30 & 31 Vict. ch. 35, sec. 6.

KING V. FEDERAL LIFE ASSURANCE COMPANY.

Costs—Third Parties—Indemnity.

The defendants, having paid to other persons the moneys claimed by the plaintiff, brought in those persons as third parties for indemnity, whereupon the third parties paid the plaintiff the amount of his claim and costs :—

Held, that the defendants were entitled to be paid by the third parties, their costs of defence to be taxed between solicitor and client, and their costs of the claim over against the third parties to be taxed between party and party.

Hartas v. Scarborough, 33 Sol. J. 661, followed.

[December 21, 1895.—*The Master in Chambers.*]

MOTION by the defendants for an order disposing of the question of their costs of the action, all other questions having been determined by agreement between the parties. The facts are stated in the judgment.

The motion was argued before the Master in Chambers on the 19th December, 1895.

Masten, for the defendants.

G. C. Campbell, for the third parties.

Judgment was delivered on the 21st December, 1895.

THE MASTER IN CHAMBERS.—A question of the manner in which the defendants' costs should be taxed.

The plaintiff sued the defendants for the recovery of the amount of a policy upon the life of his mother. The defendants had previously paid the amount to the executors of the mother's will, taking from them a bond of indemnity. The defendants brought in the executors as third parties for the purpose of indemnity, and subsequently the executors paid the plaintiff the amount claimed by him and the costs of the action.

The defendants ask that their costs should be taxed between solicitor and client and paid to them by the third parties.

In my opinion, effect should be given to their contention, following the decision of Mr. Justice Wills in *Hartas v. Scarborough*, 33 Sol. J. 661. See also *Trust and Loan Co. v. Covert*, 39 U. C. R. 327, and *Smith v. Compton*, 3 B. & Ad. 407. In *Hutton v. Wanzer*, 11 P. R. 302, the same principle was conceded and followed.

The costs of the defendants' defence of the action will be taxed between solicitor and client; the costs of adding the third parties and subsequent thereto, so far as the third parties are concerned, between party and party.

FARMERS' BANK V. SARGENT ET AL.

Summary Judgment—Promissory Note—Unconditional Leave to Defend.

On a motion for summary judgment under Rule 739 in an action upon a promissory note, one of the defendants gave facts on affidavit shewing that the note was without consideration, invalid, and fraudulent as to the first holders, and stated his belief that the plaintiffs were suing on behalf of the first holders and had notice of the circumstances invalidating the note, but stated no facts as to such notice :—

Held, that the defendant should have unconditional leave to defend.

[January 7, 1896.—*Divisional Court.*]

AN appeal by the defendant Lewis Sargent from an order of FALCONBRIDGE, J., in Chambers, affirming an order of the Master in Chambers, under Rule 739, allowing the plaintiffs to sign summary judgment against the appellant. The facts are stated in the judgment.

The appeal was argued before a Divisional Court composed of BOYD, C., and ROBERTSON, J., on the 19th December, 1895.

M. Wilkins, for the appellant.

E. T. English, for the plaintiffs.

On the 7th January, 1896, the judgment of the Court was delivered by

BOYD, C.—On motion for speedy judgment on a promissory note, under Rule 739, the defendant Sargent gives facts on affidavit shewing that the note was without consideration, invalid, and even fraudulent as to the first holders, and he states his belief that the plaintiffs, who are out of the jurisdiction, are suing on behalf of these first holders, and that they had notice of the circumstances invalidating the note. The objection is that the affidavit is not sufficient to ward off immediate judgment, because no facts are stated as to notice.

It is not essential to state facts under the Rule, if the Court is satisfied that there is a good defence on the merits,

or that the case is of such a nature that the trial should proceed in the usual way. The latter is the gloss which is put upon the Rule by the decisions. If there appears to be no real defence—if any defence that could be framed appears to be frivolous or merely to gain time—the Court will shut out the defendant from being heard. This is, throughout, a suspicious transaction, and though the foreign plaintiffs may be blameless, the defendant evidently does not so think or believe. And it is right that the claims of the plaintiffs and the contentions of the defendant should be ventilated in open Court.

In an early case (the case of a note), when the practice was being settled, it was held by Bramwell, L. J., that when the affidavits disclosed reasonable ground for supposing that the defendant had a plausible defence, the Court would not force him to withhold it from a jury, and he said further, upon the scope and intent of the Rule, that the defendant should not be debarred of his defence except where it was plainly vexatious and groundless: *Beckingham v. Owen*, W. N. 1878, p. 215. See also *Bank of Minnesota v. Page*, 14 A. R. at p. 352; *Newry Loan Co. v. Brady*, 18 Ir. L. T. R. 53; and *Sheppards v. Wilkinson*, 6 Times L. R. 13.

The safe result in such a case as this is to give leave to defend unconditionally, and this will be the judgment of the Court.

This decision is not necessarily inconsistent with *Merchants' Bank v. Ontario Coal Co.*, 16 P. R. 87, which rests on its own circumstances.

Order below and judgment vacated with costs of it and appeal to be in the cause to the defendant.

RE CURRY, CURRY V. CURRY ET AL.

Administration Order—Executor—Reference—Conduct of—Parties.

An accounting party should not have the carriage of the proceedings in the Master's office, especially where there is a competition between an executor and beneficiaries as to who should be first in obtaining an administration order.

Such an order, obtained *ex parte* on the application of an executor, was varied by giving the conduct of the reference to two of the legatees, where the Judge had not been referred to the course of practice, and so had exercised no discretion to prevent the interference of the Court.

The order should not have been made without notice to the legatees, who were named as parties defendant in the proceedings taken by the executor.

[January 9, 1896.—*Divisional Court.*]

UPON the *ex parte* application of John Curry, surviving executor of the will of James R. Curry, the Master in Chambers made an order, in the ordinary form, for the administration of the estate of the testator. The affidavit of the applicant upon which the order was based shewed that the application was made because there were disputes between the legatees under the will. The affidavit and order were intituled "In the matter of the estate of James R. Curry : between John Curry, plaintiff, and Annie H. Curry, Cora J. Curry, and W. G. Curry, defendants."

Upon an appeal by the defendants Annie H. Curry and Cora J. Curry from the Master's order, ROSE, J., varied it by adding a clause declaring that it was made without prejudice to any application which the appellants might make in the Master's office for the carriage of the order and conduct of the reference, but in all other respects affirmed it.

The same defendants appealed from the order of ROSE, J., seeking to set aside the administration order altogether, upon several grounds, or, in the alternative, to vary it by giving the appellants the conduct of the reference.

The appeal was argued before a Divisional Court composed of BOYD, C., and STREET and MEREDITH, JJ., on the 8th January, 1896.

L. G. McCarthy, for the appellants.

W. H. Blake, for the plaintiff.

The judgment of the Court was delivered on the following day by

BOYD, C.—There appears to be no reason to interfere with the order for administration upon the merits: the only point on which a change should be made is as to the carriage of the proceedings in the Master's office.

The general rule is that an accounting party should not have the carriage of the proceedings, and that is especially so where there is a competition between an executor and beneficiaries as to who should be first in obtaining an administration order. The Judge had not his attention directed to this course of practice and the decisions on which we now proceed. He exercised no discretion, therefore, which should interfere with our modifying the order so as to give the conduct of affairs in the Master's office in the first instance to the defendant appellants. In other respects, the Master will guide the course of proceedings in his office. We refer to *Naylor v. Smith*, 15 W. R. 528; *Allen v. Norris*, 28 Sol. J. 481; *S. C.*, W. N., 1884, p. 118; and *Re Swire*, 21 Ch. D. 647.

There should be no costs of this appeal, having regard to the variation made in the order, and also because the order in the first place should not have been made against these appellants without proper notice having been served upon them.

HARVEY ET AL. V. AIKINE.

Judgment Debtor—Examination—Answers—Gambling Transactions.

Upon a motion to commit a judgment debtor for unsatisfactory answers upon his examination, the Court should not be called upon to inquire into gambling transactions, that is, practically, to take an account to ascertain what money was made and subsequently lost in that way by the judgment debtor, so as to determine whether, arising therefrom, any profits remained as estate in the debtor's possession.

[January 11, 1896.—*Divisional Court.*]

AN appeal by the plaintiffs from an order of BOYD, C., in Chambers, dismissing an application by the appellants to commit the defendant to the common gaol of the county of Lincoln, for refusing to disclose his property and his transactions respecting the same, and for making unsatisfactory answers respecting the same, upon his examination as a judgment debtor, and for concealing or making away with his property in order to defeat and defraud his creditors or some of them.

The examination shewed that during a period of two years prior to it the defendant had lost over \$200 in gambling transactions, but that was before he began the business he was then carrying on; that he had ceased gambling, save in making small bets, ever since he had been in that business; and it did not appear that he was concealing his assets, or the disposition of them, by his refusal to answer questions concerning his gambling transactions.

The appeal was argued before a Divisional Court composed of MEREDITH, C.J., and ROSE, J., on the 19th November, 1895.

J. W. Nesbitt, Q.C., for the plaintiffs.

E. G. Rykert, for the defendant.

Judgment was delivered on the 11th January, 1895.

ROSE, J.—I agree with the learned Chancellor that the Court should not be called upon to inquire into gambling

transactions, that is, practically, to take an account, to ascertain what money was made and subsequently lost, so as to determine whether, arising therefrom, any profits remained as estate in the debtor's possession. An examination as to any estate in the debtor's possession, of course, would be proper, and should be met by full and free disclosure. And, generally speaking, I doubt the becomingness of a search through gambling houses or other places of evil resort, to unearth the particulars of losses by gambling. More harm than good, possibly, might result from such an inquiry. If such an inquiry should be made, then the Court might be asked to have the accounts taken of a business of another sort of ill-fame, which, as it appears to me, would not be seemly.

Had it appeared here, however, that the debtor was refusing to disclose particulars as to how he had disposed of his estate, which, if in hand, might have been taken in execution or otherwise been made available to satisfy the judgment creditors' claim, and to prevent inquiry, had boldly stated that he had lost it by gambling, I should have found it necessary to more carefully consider his right to refuse to make answer to questions tending to discover such particulars as would enable the creditors to test the truth of his statements, and to ascertain whether his estate had thus been dissipated. A perusal of the evidence, however, leads me to conclude that, substantially, the creditors have been informed what the debtor has done with his estate, and the means he now has of paying the debt, and that no good would result from ordering the debtor to be committed for his default in giving full information in answer to some of the questions which he refused to answer, but which were proper to be answered.

It is quite doubtful if sufficient appears to enable one to say that the debtor was claiming privilege, or made it to appear that the transactions he referred to were such as might render him liable to criminal prosecution.

On the whole, I am not satisfied that the learned Chancellor exercised an unwise discretion in refusing to make

the order ; but, while thus deciding, I am not at all sure that, technically, the defendant is in the right ; and, therefore, while the motion should be refused, it should be without costs.

MEREDITH, C.J., concurred.

WILLIAMS V. LEONARD ET AL.

Amendment—Pleading—Bills of Sale Act—Chattel Mortgage.

Decision of the Queen's Bench Division, 16 P. R. 544, affirmed on appeal.

[January 14, 1896.—*The Court of Appeal.*]

AN appeal by the plaintiff from the order and decision of the Queen's Bench Divisional Court, 16 P. R. 544, was argued before HAGARTY, C. J. O., and BURTON, OSLER, and MACLENNAN, JJ.A., on the 3rd December, 1895.

Moss, Q. C., for the appellant.

Gibbons, Q. C., for the defendants.

On the 14th January, 1896, judgment was delivered unanimously affirming the decision of the Court below, on the ground that, under the circumstances, the evidence which proved it being in, the amendment had been properly allowed.

MILLS V. HAMILTON STREET RAILWAY COMPANY.

Costs—County Court—Nonsuit by Judge ex mero motu—Appeal.

Upon the trial of a County Court action, counsel for the defendants, at the close of the plaintiff's case, formally moved for a nonsuit, and stated that he would renew the motion at the close of the defendants' case. Then he called and examined three witnesses, but, when a fourth was sworn, the Judge interposed and said he would take the responsibility of entering a nonsuit. He heard argument from the plaintiff's counsel opposing this course, and the defendants' counsel said he proposed to tender his evidence and go on and complete the case. The Judge refused to hear further evidence, and entered a nonsuit, which in term he refused to set aside, the defendants' counsel neither opposing nor assenting to the motion. The plaintiff successfully appealed to the Court of Appeal. Upon the argument there, the defendants' counsel took the same position, but urged that the defendants should not be ordered to pay costs:—

Held, however, that nothing was shewn to induce the Court to depart from the general rule; and the defendants were ordered to pay the costs of the appeal, the lost trial, and the motion in term.

The mere fact that the Judge below has *ex mero motu* made an erroneous adjudication is not a ground for absolving the respondent from the costs of the appeal.

[January 14, 1896.—*The Court of Appeal.*]

AN appeal by the plaintiff from an order of the Judge of the County Court of Wentworth, in term, dismissing a motion to set aside a nonsuit entered by him at the trial of an action in that Court for damages for negligence.

The appeal was argued before HAGARTY, C. J. O., and BURTON, OSLER, and MACLENNAN, JJ.A., on the 19th November, 1895.

J. W. Nesbitt, Q. C., for the appellant.

E. Martin, Q. C., for the defendants, did not oppose the appeal nor consent to its being allowed, but asked that costs should not be given against them.

Judgment was delivered on the 14th January, 1896.

OSLER, J. A.—Judgment on this appeal was reserved only to consider the question of costs, as it was apparent that the nonsuit at the trial, and the judgment in term refusing to set it aside, were wrong, there being evidence

to go to the jury in support of the plaintiff's case. Mr. Martin argued that his clients should be absolved from payment of the costs of the appeal, and of the costs of the lost trial and motion in term, because the learned Judge had, as it were, taken the matter into his own hands at the trial, and nonsuited the plaintiff against the wish of the defendants, who desired to give all their evidence and "complete the case."

What occurred at the trial, as reported in the evidence, was this. At the close of the plaintiff's case, counsel for the defendants said, "I submit that the plaintiff, on his own shewing, has not made out any case, and I will now move formally for a nonsuit, and renew the motion at the close of the defendants' case." Then he called and examined three witnesses, and on the fourth being sworn, the learned Judge interposed with the observation that it was not fair to the other jurymen to take up the time of the Court, and that he would take the responsibility of entering a nonsuit. He heard argument from the plaintiff's counsel opposing this course, and the defendants' counsel said, "I propose to tender my evidence and go on and complete the case." The learned Judge refused to hear it, and entered a nonsuit, which in term he refused to set aside; the defendants' counsel, as it was said, neither opposing nor assenting to the motion.

I am of opinion that nothing has been shewn by the respondent which should induce us to depart from the general rule that the successful appellant should have his costs of the appeal. It is a rule which in these County Court appeals has, with occasional exceptions for special reasons, been acted upon since 1871: see *Eddy v. Ottawa City Passenger R. W. Co.*, 31 U. C. R. 569, 576, note (a). Even prior to the C. S. U. C. ch. 15, sec. 68, such costs were in the discretion of the Court, though I think they were never given where the appeal was allowed, following the almost universal rule that the appellant did not get costs on the reversal of the judgment below: Marshall on Costs, 2nd ed., p. 197: upon the principle, I suppose, that it was not reason-

able that the unsuccessful party should pay for the error of the Judge. But about the time I have mentioned, a different rule was adopted, and the English practice in that respect followed, partly, I think, for the reason mentioned in *Robinson v. Lawrence*, 2 L. M. & P. 673 (if for no other), viz., that in appeals from County Courts the costs of the appeal should always follow the result, since the value of the subject-matter in dispute in a County Court usually bears a small proportion to the costs incurred by the appeal. See also *Gibbon v. Gibbon*, 13 C. B. 205, 219, to the same effect. There is, besides, the practice which has been applicable to all appeals since the introduction of the Judicature Act, that, as costs have now been placed in the discretion of the Court, the old rule that the successful appellant has to bear his own costs is no longer to be acted upon, unless the particular Court in the particular case shall make an order to the contrary: see *Memorandum*, 1 Ch. D. p. 41; *Sparrow v. Hill*, 7 Q. B. D. 362, 368, per Lindley, J.

Then as to the costs below. We are to give such order or direction to the Court below as the law requires: R. S. O. ch. 47, sec. 52. We must direct that Court to set aside the nonsuit. It certainly was not the plaintiff's fault that he was nonsuited. The defendants moved formally at the close of the plaintiff's case for a nonsuit, and announced that they would renew the motion at the close of the whole case. That motion was still before the Judge, and if it had been renewed, and the Judge had given effect to it after all the defendants' evidence was in, they could not have hoped to be relieved from payment of the costs, if the nonsuit turned out to be wrong; and, so far as I am aware of any practice to the contrary, the general rule would be the same if the Judge had then *ex mero motu* dismissed the action. But what the Judge did here was to give effect to the motion the defendants did make, saying, in effect, that no evidence they could give would make the plaintiff's case worse than it was when he closed it. And, as regards the defendants, it is quite immaterial at what stage of the case the Judge went wrong, whether at

the close of the plaintiff's case, or in the middle or at the end of their own, because the necessary result is a new trial, the case having been tried with a jury. Had there been no jury, they would have had more reason to complain of the case having been stopped before all the evidence was in, as a new trial might otherwise have been avoided, the Judge or Court of Appeal disposing of the case upon the whole evidence. As the case stands, I think it would be unjust to the plaintiff to throw the costs in question upon him, and therefore the order to be made in the Court below must be that they be paid by the defendants.

HAGARTY, C. J. O., and BURTON and MACLENNAN, JJ.A., concurred.

MERIDEN BRITANNIA COMPANY V. BRADEN ET AL.

Costs—Liability to Solicitor—Taxation against Opposite Party.

Where, by the terms of an express contract, a party is not to be liable for costs to the solicitor representing him in an action, he cannot tax costs against the opposite party.

Jarvis v. Great Western R. W. Co., 8 C. P. 280, and *Stevenson v. City of Kingston*, 31 C. P. 333, approved.

Decision of the Chancery Division, 16 P. R. 410, affirmed.

[January 14, 1896.—*The Court of Appeal.*]

AN appeal by the defendant Scott from the order and decision of a Divisional Court of the Chancery Division, 16 P. R. 410, reversing decisions of BOYD, C., and the Master in Chambers, *ib.* 346, and restoring a ruling of one of the taxing officers refusing to tax to the appellant his costs of the action under a judgment which ordered the plaintiffs to pay the costs of the defendants. The facts appear in the former report and in the present judgments.

The appeal was argued before HAGARTY, C. J. O., and BURTON, OSLER, and MACLENNAN, JJ.A., on the 20th November, 1895.

W. H. P. Clement and *A. McLean Macdonell*, for the appellant.

J. W. Nesbitt, Q. C., for the plaintiffs.

Judgment was delivered on the 14th January, 1896.

OSLER, J. A.—This action was brought by the plaintiffs, creditors of the defendant Braden, for the purpose of setting aside a sale which the defendants McMahon, Broadfield, & Co. had made to the defendant Scott under a chattel mortgage from Braden. The action was dismissed with costs on appeal to this Court, and the question in the present appeal is as to the costs of the defendant Scott, the plaintiffs' contention being that, under the circumstances, he has no costs which he is entitled to tax against them.

It appeared in the course of the proceedings that Scott, as purchaser of the stock under the chattel mortgage, had been indemnified by the vendors against loss, costs, and damages, or, as he himself put it in his evidence at the trial, they had guaranteed that in the event of any other creditor giving trouble they would protect him.

The writ was issued on the 6th May, 1893, and on the 8th May, Messrs. Macdonell & Scott, of Toronto, solicitors for the defendants McMahon & Co., addressed the following letter to the defendant Scott, who resided at Woodstock :

MERIDEN V. BRADEN.

DEAR SIR :—We presume you have been served with the notice of motion and writ of summons in the action of the Meriden Britannia Company against John Braden, Messrs. McMahon, Broadfield, & Co., and yourself. As the interests of Messrs. McMahon, Broadfield, & Co. are identical with yours, we presume that you will recognize that it is not desirable that you should go to any expense of retaining a solicitor of your own in the matter. We therefore suggest that you instruct Messrs. Scott, Lees, & Hobson, barristers, Hamilton, who are our Hamilton agents. They

are probably the most experienced firm in Ontario in matters of this kind. If you see fit to do so, kindly sign the enclosed retainer and return the same to us. We write you thus at the instigation of Messrs. McMahon, Broadfield, & Co.

Yours truly,

MACDONELL & SCOTT.

The enclosure was as follows :

I, the undersigned, hereby instruct and retain Messrs. Scott, Lees, & Hobson, of the city of Hamilton, to act as solicitors on my behalf in this action, to enter defences and conduct defences as they may advise until final disposition of the action ; any costs herein to be charged to McMahon, Broadfield, & Co.

Dated at Woodstock this 9th day of May, 1893.

In the absence of any evidence to the contrary, it is to be presumed that this document was returned as requested to Messrs. Macdonell & Scott by the defendant James Scott, and that it reached the hands of Messrs. Scott, Lees, & Hobson through those gentlemen. It was admitted that the words "any costs herein to be charged to McMahon, Broadfield, & Co." had been added to the retainer by Scott himself before returning it.

No affidavit bearing on the point in dispute was filed by the defendant Scott, or by his co-defendants McMahon, Broadfield, & Co., or by the solicitors, Scott, Lees, & Hobson.

The Judicature Act is said, speaking generally, to have repealed the former Acts by which a successful plaintiff or defendant was entitled to costs against his opponent, but that is, in substance, only by placing such costs in the discretion of the Court. Where they are awarded, they are awarded to the party, and not to the solicitor, and they are adjudged to and recovered by him as reimbursement of his expenses incurred in prosecuting or defending the action.

The costs of his defence to this action have been awarded to the defendant Scott. Has he incurred any ? If he retained the solicitors on the terms that he should not be

answerable or liable to them for the costs, the answer must be that he has not. The onus of proving this undoubtedly lay upon the plaintiffs, and it may be conceded that the proof ought to be very clear.

Looking at the circumstances under which the retainer was procured and sent to the solicitors, its language, and the absence of any explanation from the parties interested, can there be any reasonable doubt that the defendant was not liable to these solicitors? It seems to me that there is not. What then should follow? It is contended that the question of the defendant's liability cannot be, or ought not to be, investigated for the purpose of relieving the plaintiffs from payment of these costs. If the retainer was on the express terms that the solicitors should have no claim for them against the defendant, I think it must be the right of the party who has been ordered to pay costs to shew that there are no costs to be paid. The defendant has incurred no expense: why then should the plaintiff pay him anything?

In *Dooly v. Great Northern R. W. Co.*, 4 E. & B. 341, it was held that where a plaintiff sued in *formâ pauperis* and obtained a verdict, he could recover no costs from the defendant either in respect of counsel fees or for services of his attorney. There the Judge at the trial had certified for costs, but the effect of the statute 11 H. VII. ch. 12, and the Gen. Rule 121, H. T. 16 Vict., being to prevent the pauper plaintiff's counsel or attorney taking anything from him for their services, he could himself recover nothing from the defendant in respect of them. Lord Campbell, C. J., said: "The statute of Gloucester gave the plaintiff recovering damages the costs of his writ, and that has always been construed as including all the costs expended in consequence of the defence by the defendant. Then has not this plaintiff been allowed all that she has paid or become liable to pay in consequence of the defence? How can it be said that she was liable either at law or in honour to pay those rewards which the statute expressly (and I think most judiciously) says shall not be paid?"

Under the Rules of the Supreme Court, 1883, Order XVI., a successful plaintiff in an action in *formâ pauperis* is entitled upon taxation as against the defendant to costs out of pocket only, and cannot be allowed anything for remuneration to his solicitor or fees to counsel : *Carson v. Pickersgill*, 14 Q. B. D. 859.

In the recent case of *Richardson v. Richardson*, 11 R., Nov., p. 19, it was held that the same rule ought to be applied to a pauper petitioner in the Divorce Division as against a co-respondent. Lindley, L. J., said : " The true principle is that the successful litigant should be indemnified against the expenses he has had to incur. Why should he recover more than he is liable to pay ? I cannot see why he should make a profit." And *per* Lopes, L. J. : " What is the object of giving costs ? Costs are given to indemnify the successful party against expenses to which he has been put by his unsuccessful opponent. A pauper litigant has not incurred any expenses. There is nothing to indemnify him against."

The question seems to have arisen on more than one occasion in reference to the costs of business done by an uncertificated solicitor, and, although the decisions are not uniform, it came to be finally settled that although such a solicitor was unable to maintain any action against his client to recover costs and disbursements for business done while he was uncertificated, yet that the client himself could recover them from the opposite party, unless it could be shewn that he had refused to pay his solicitor on the ground of his being unqualified. But this was on the ground that the Act of 1843 then in force relating to attorneys and solicitors merely deprived the solicitor of his remedy against his client in such case, but did not extinguish the debt for the business done upon his retainer, and if the client chose to act honourably and not to take advantage of the Act, there was no reason why he should not recover his costs : *Cordery on Solicitors*, 2nd ed., pp. 40, 41 ; *Morgan & Wurtzburg on Costs*, p. 566 ; *In re Hope*, L. R. 7 Ch. 766 ; *Scott v. Daly*, 12 P. R. 610.

A later Act, passed in 1874, used language which was held in *Re Fowler v. Monmouthshire Canal Co.*, 4 Q. B. D. 334, to be wide enough to include the case of the client, and accordingly in England it is now the law that where the solicitor is uncertificated, the client cannot recover costs from the opposite party.

In principle it is difficult to distinguish between a case in which by statute the solicitor has no costs against his client, and one in which by express contract with his client he is to have none. If in the former the client cannot recover costs against the opposite party, it seems to me *a fortiori* that he cannot do so in the latter.

I see no reason to find fault with the decision of the Court of Common Pleas (Draper, C. J., Richards and Hagarty, JJ.), T. T. 1858, in *Jarvis v. Great Western R. W. Co.*, 8 C. P. 280. It rests on a sound principle, and we cannot reverse the judgment now in appeal without overruling it and the case in which it was followed many years afterwards of *Stevenson v. City of Kingston*, 31 C. P. 333. It is worth noting that immediately after that case was decided the Legislature altered the law as applied to the facts there in question by enacting that a municipal corporation might recover costs though their solicitor was paid by an annual salary, and they were not liable to him for the costs of defending an action.

The case of *Galloway v. Corporation of London*, L. R. 4 Eq. 90, is so different in its facts from the case of *Jarvis v. Great Western R. W. Co.* that it cannot be regarded as reducing the authority of the latter to any extent.

In the present case our decision works neither hardship nor injustice. The defendant Scott suffers no loss, and his solicitors conducted his defence knowing that they could have no claim against him. I do not think the case of the other defendants, who may be in the end liable to pay Scott's costs without being able to recoup themselves, is deserving of much consideration. They undertook to intervene and to procure the retainer by Scott of the Hamilton agents of their own solicitors, so that he "should

not go to any expense of retaining a solicitor of his own in the matter," because "their interests were identical with his."

Scott assented to that view of the case, and left himself practically in their hands. That being so, there seems no reason why he should have defended by a separate solicitor, or why McMahon, Broadfield, & Co.'s solicitors should not have also appeared and defended for him. In effect, they retained two solicitors, and there is no reason why they should, as in fact they cannot, have two sets of costs.

On the whole, I am of opinion that the judgment is right, and that the appeal should be dismissed.

MACLENNAN, J. A.—I think this appeal fails.

There can be but one construction of the letter of the 8th of May, 1893, from the solicitors Macdonell & Scott to the defendant Scott, and of the retainer of Messrs. Scott, Lees, & Hobson, signed by Mr. Scott, dated the 9th May following. The retainer stipulates that the costs are to be charged to McMahon, Broadfield, & Co., his co-defendants, and not to him, and these are the terms on which it was accepted by the solicitors. That being so, the defendant Scott did not incur, or become liable for any costs, and the plaintiffs, therefore, have no costs to pay him. That such is the result of such a retainer is not only decided by the cases in our own Courts which have been cited, but is also in accordance with English decisions, of which one is quite recent, *Richardson v. Richardson*, [1895] P. 346; *Carson v. Pickersgill*, 14 Q. B. D. 859.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal dismissed with costs.

PARKER V. MCILWAIN.

Attachment of Debts—Rents—Ex Parte Orders—Rescission of—Mortgagee—“Party Affected”—Notice to Tenants—Attornment—Assignment of Rents.

Held, reversing the decision of the Common Pleas Divisional Court, 16 P. R. 555, that mortgagees who had served notice upon tenants of the mortgagor, in occupation of the mortgaged premises, to pay the rents to them, and to whom such tenants had attorned, were, within the meaning of Rule 536, “parties affected” by *ex parte* orders obtained by a judgment creditor of the mortgagor attaching such rents as debts. And *semble*, *per* OSLER, J. A., that, even without that Rule, the practice would have warranted a substantive motion by a third party interested to discharge the attaching orders.

Held, also, that the attaching orders ought to be set aside; for, (1) although the service of the notice upon the tenants was not in itself sufficient to cause the tenants subsequent to the mortgage to hold of the mortgagees, there was satisfactory evidence of an attornment by the tenants; and (2) the notice signed by the mortgagor under the words “I approve of the above,” operated as an assignment of the rents to the mortgagees.

An attaching order binds only such debts as the debtor can honestly deal with without affecting the interests of third persons.

[January 14, 1896.—*The Court of Appeal.*]

AN appeal by the Scottish American Investment Company (Limited), by leave of the Court of Appeal, from an order of a Divisional Court of the Common Pleas Division reversing the order of ROBERTSON, J., affirming the order of the Master in Chambers rescinding two attaching orders made by himself. The judgments below are reported 16 P. R. 555, where, and in the judgments in this Court, the facts are stated.

The appeal was argued before HAGARTY, C. J. O., and BURTON, OSLER, and MACLENNAN, JJ.A., on the 28th November, 1895.

W. Cassels, Q. C., and *W. H. Lockhart Gordon*, for the appellants.

Aylesworth, Q. C., and *J. E. Cook*, for the plaintiff.

Judgment was delivered on the 14th January, 1896.

OSLER, J. A.—I am of opinion that this appeal should be allowed. There are just two questions: 1. Whether

the mortgagees have a right to intervene and apply to set aside the garnishee order as parties affected; and, 2. Whether they have clearly shewn that the debts sought to be attached were not, under the circumstances, garnishable.

And first, I think the appellants are parties affected by the *ex parte* attaching order within the meaning of Con. Rule 536; not perhaps directly, as they are not named therein, but as parties claiming to be entitled to the rents sought to be attached thereby, who may be brought in before the County Judge on the suggestion of the garnishees under Con. Rule 944. It is, with all deference, not an answer to say that if the garnishees do not protect themselves by bringing in the appellants, the rights of the latter will not be precluded by any order to pay over the moneys attached. They are affected because the attaching order may become the foundation of proceedings in which their rights may be determined adversely to them; and that I think is enough to justify us in holding that Rule 536 applies. Even in the absence of that Rule, the practice would have warranted a substantive motion by a third party interested to discharge the attaching order: *Dresser v. Johns*, 6 C. B. N. S. 429. The present case is peculiarly one in which such a motion is proper, not only because of the saving of expense, but because the rights of all parties may be most conveniently finally determined on the material before us. No doubt these rights might have been dealt with by the County Judge, but that would only have been through the medium of as many summonses to pay over as there are small debts attached, involving, besides, the necessity of each garnishee bringing in the appellants as parties, on the peril of leaving himself exposed to their claim if he neglected to do so. The case of *Burrell v. Read*, 11 Times L. R. 36, may also be referred to as shewing the authority possessed by the Court to discharge the attaching order at the instance of a third party on a proper case being made out.

The next question is whether the order of the Master in Chambers, affirmed by Robertson, J., discharging the attaching order, was, under the circumstances, properly made, and whether it ought to have been set aside by the Divisional Court, the debts being shewn not to be properly garnishable. The practice under the Judicature Act follows the former practice at law, and it is clear that a garnishee order binds only such debts as the debtor can honestly deal with without interfering with the interests of third persons: *Ex p. Whitehouse*, 32 Ch. D. 512, approved and followed in the Court of Appeal in *Davis v. Freethy*, 24 Q. B. D. 519; see also *Badeley v. Consolidated Bank*, 38 Ch. D. 238.

I agree that a clear case should be made out to justify a summary rescission of the order, because all questions arising under it may usually be tried out conveniently in the ordinary way.

I think that in the present case, the interference of the Court is justified on two grounds, which are, to my mind, satisfactorily established. 1st. The tenancy of one of the tenants whose rent is sought to be attached commenced prior to the appellants' mortgage; that of each of the others is subsequent to it. On the 4th January, 1895, notice was given by the mortgagees to all the tenants that the mortgage was in arrear, and that the mortgagees claimed all rent due and accruing due in respect of the part of the mortgaged premises in their respective possession. The tenants were required to pay such rent to the mortgagees' agents, and notified that in the event of their not doing so, and paying the rents to any one else, they would be called upon to pay them over again. The notice was also signed by the mortgagor under the words "I approve of the above."

It is clearly settled by the case of *Evans v. Elliot*, 9 A. & E. 342, approved by the Court of Appeal in the recent case of *Towerson v. Jackson*, [1891] 2 Q. B. 484, that a mortgagee cannot, by merely giving notice to the mortgagor's tenant, *i.e.*, a tenant subsequent to the mort-

gage, cause him to hold of the mortgagee. As regards a tenant prior to the mortgage, the mortgagee, as owner of the reversion, is entitled, after giving notice of his mortgage, to any rent which may be in arrear at the time of the notice, as well as to what accrues after it: see the cases cited in *Kinnear v. Aspden*, 19 A. R. 468, 471, 472. In this instance that only meets the case of one of the tenants, but as to him it is a sufficient, though not the only, answer.

As to the others, the mortgagees must make out that there was an attornment or consent to hold of them, and not of their original landlord. Such an attornment may be oral, and I think it is proved here by the affidavit not merely of the clerk who served the notices, but also by the more precise and positive affidavit of the mortgagor himself, who accompanied the server. The written attornment given on the 4th April cannot be regarded as other than a confirmation or ratification of the verbal one of the previous January, and therefore, when the garnishee order now in question was served, there was nothing upon which it could properly attach.

The further ground on which it appears to me that the order should be discharged is that the notice, signed and approved as it was by the mortgagor, operated as an assignment by him of the rents to the mortgagees: see *Knill v. Prowse*, 33 W. R. 163: and upon rent so assigned the attaching order could have no effect.

The order of the Judge in Chambers affirming the Master should, therefore, in my opinion, be restored.

MACLENNAN, J. A.—In this case an order was made at the instance of the plaintiff, a judgment creditor of defendant, attaching a number of small debts due from tenants of the judgment debtor for rent, and the order contained a summons to pay over, returnable before the junior Judge of the County Court. The Scottish American Investment Company were mortgagees of the houses of which the debtor's tenants were occupiers, and in respect of which

the rents sought to be garnished were alleged to be due or accruing.

The Scottish American Company, hearing of the attaching order and summons, moved before the Master in Chambers, who had made the order, to discharge it, on the ground that the rents sought to be garnished belonged to them, and not to the defendant, their mortgagor, and that, consequently, they could not be attached. The learned Master in Chambers granted the company's application, and set aside the order. This order was affirmed by Mr. Justice Robertson, and the plaintiff appealed to the Divisional Court, which allowed the appeal, and the original order of the Master in Chambers was restored. The present appeal is by the Investment Company from the order of the Divisional Court.

The facts are briefly as follows. The defendant mortgaged houses in Sackville street to the Investment Company on the 16th August, 1893, to secure \$11,000; afterwards he mortgaged the same houses to the plaintiff for \$539. On the 19th January, 1895, the company obtained a judgment of foreclosure against the defendant, with a personal order for payment, and also an order for immediate possession of the houses. On the 23rd January the plaintiff was made a party in the Master's office in the foreclosure action, as a subsequent incumbrancer, and on the 28th February the Master made his report, settling the priorities, etc. The plaintiff's judgment is for her mortgage debt, and was recovered on the 5th December, 1894. There are two attaching orders in question, the first dated the 9th February, 1895, and the other 28th February, 1895, both alike, except that the first is against fourteen garnishees, and the other against the same fourteen and two others, Cleland and Young. The tenants all became such after the making of both mortgages, except Austin, whose tenancy began before the mortgages. The tenants were not made parties to the foreclosure proceedings, but on or about the 4th January, 1895, the company caused to be served on them respectively a notice in writing that the company

were mortgagees of the houses occupied by them respectively; that the mortgage was in arrear; that the company claimed all rent due and accruing for the houses; that the tenants must pay the said rent to the company's agents, Messrs. Gordon & Sampson, and to no other person; and, in the event of their paying rent after the notice to anyone else than such agents, the payments would be of no avail, and they would be called upon to pay the same again. This notice appears to have been served only upon eight of the garnishees, including Austin, and the orders in question in the appeal are therefore confined to those eight persons.

It was contended that the Master in Chambers had no power to set aside his own order at the instance of the Investment Company. I am, however, clearly of opinion that the company is a party affected by the order, and that being so, it was competent to them to move under Rule 536. It is conceded that the company might appear on the return of the summons, and shew that the rents belonged to them and not to the debtor; and if so, it follows that they were entitled to move against the order under the Rule referred to.

The further question is whether the Master was right in setting aside the order. The ground of the motion was that the tenants had attorned to the company as mortgagees, and from that time ceased to be tenants of the mortgagor, and that rents subsequently accruing belonged to the mortgagees.

In the first instance, the company merely set up the notice which they served upon the tenants, and which has already been mentioned, as shewing that the rents belonged to them. That would have been clearly insufficient: *Moss v. Gallimore*, 1 Sm. L. C., 9th ed., p. 604; and see a very recent case, *Towerson v. Jackson*, [1891] 2 Q. B. 484, a decision of the Court of Appeal. That case makes it clear that nothing short of an agreement between tenants of the mortgagor who came in after the mortgage and the mortgagee, will make such tenants the tenants of the latter and liable to pay their rents to him. No mere notice from the

mortgagee will do. If the tenant do not attorn, he is liable to have an ejectment brought against him, in which case he would be liable for mesne profits to the mortgagee, from the commencement of the action, or perhaps after demand of possession. The tenant's title in such a case is derived from the mortgagor, and is no higher than his. The tenant is a person who has acquired from the mortgagor an interest in the equity of redemption. His possession and tenancy are lawful under the proviso in the mortgage for possession by the mortgagor until default. Therefore, until default, and until the mortgagee elects to demand possession, or to enter by reason of the default, the tenant is estopped from denying his landlord's title, and all rents which have accrued up to that time are due and must be paid to the landlord.

In the present case, however, the company did not demand possession, but only payment of the rent to them. That of itself had no effect, except with regard to Austin, as to whom it was quite sufficient. On the return of the motion the company desired to strengthen their case, and the Master permitted two other affidavits to be filed, that of Moore, who served the notices, and one by McIlwain, the debtor.

Moore says, but rather vaguely, that each of the tenants assented to the notice served upon him; and McIlwain says that at the time of the service he was present, and informed each of them that the company was now entitled to enter into possession, and to collect the rents due and to become due, and requested them to pay the same to the company, and that each of the tenants assented thereto. These affidavits are not contradicted or questioned in any way; and I am clearly of opinion that they make out an attornment by the tenants from that time to the company, and that the rents subsequently accruing became due to the company, and not to the mortgagor.

I also agree with my brother Osler in the view which he takes of the signature by the mortgagor McIlwain at the foot of each of the notices served, thus: "I approve of

the above," signed, "J. A. McIlwain." My learned brother thinks, and I agree with him, that this operated as a good assignment by McIlwain of the rents to the company. I am inclined to go further, and to say that its effect is the same as if the notice had been a joint notice by McIlwain and the company, and that it assigned to the company McIlwain's reversion, as the landlord of all the tenants, which, being an equitable interest, could be transferred by mere writing without deed.

I think the appeal should be allowed.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal allowed with costs.

CLARKSON ET AL. V. DWAN.

Summary Judgment—Writ of Summons—Special Indorsement—Goods Sold—Promissory Notes—Status of Plaintiffs—Affidavits—Amendment—Compound Judgment.

Since the Bills of Exchange Act, 1890, interest on an overdue promissory note may be specially indorsed for, and may be simply claimed as "interest," meaning interest at the statutory rate from maturity, which is now given as liquidated damages.

McVicar v. McLaughlin, 16 P. R. 450, followed.

It appeared by the writ of summons that one of the two plaintiffs sued as liquidator of a company, the other plaintiff being also a company:—

Held, that an indorsement "for goods sold and delivered during the year 1894 to the defendant by the O. C. Co., whereof the plaintiff C. is liquidator, \$353," was a good specially indorsed claim on the part of C.; and an indorsement on promissory notes made by defendant, giving dates, amounts, and times when payable, and adding, "and assigned to the L. H. C. Co., one of the plaintiffs herein," was a good claim specially indorsed as to the L. H. C. Co., though the way in which that company became assignee was not detailed, there being no suggestion that they were not the legal holders.

Upon a motion for summary judgment under Rule 739 it appeared by affidavits that the plaintiff company were mortgagees of the claims, and the liquidator transferee subject to the co-plaintiffs' claims:—

Held, that the affidavits shewed that the special indorsement was not in conformity with the facts, and therefore failed to verify it, and no amendment could be permitted upon the motion; nor could judgment be given, in accordance with the special indorsement, as to one part in favour of the liquidator, and as to the other in favour of the company.

MEREDITH, J., dissenting.

[January 16, 1896.—*Divisional Court.*]

THIS was an action brought by E. R. C. Clarkson, liquidator of the Ontario Coal Company of Toronto, and the Lehigh Valley Coal Company, plaintiffs, against Michael Dwan, defendant.

The writ of summons was indorsed as follows:—

"Plaintiffs claim \$2,430.82 for goods sold and delivered to the defendant, and on promissory notes. The following are the particulars:—

1. To goods sold and delivered during the year 1894, to the defendant, by the Ontario Coal Company of Toronto (Limited), whereof the plaintiff Clarkson is liquidator \$ 355 55

2. To promissory note for \$1,000 dated 2nd April, 1894, made by defendant, payable two months after date—		
Principal	1,000	00
Interest.....	100	00
Notarials	1	86
3. To promissory note for \$1,769.00 dated 20th April, 1894, made by the defendant, payable two months after date—		
Principal	1,769	00
Interest.....	165	14
Notarials	1	86
	<hr/>	
	\$3,393	40

and assigned to the Lehigh Valley Coal Company, one of the plaintiffs herein.

Cr.

1894, Aug. 5.—By Cash	\$200	00
Interest to date. .	16	00
	<hr/>	
	\$216	00
Dividends by assignee and interest to date	746	59
	<hr/>	
	962	59
	<hr/>	
Balance due	\$2,430	82"

The defendant entered an appearance, and, upon motion by the plaintiffs, the Master in Chambers made an order under Rule 739 for summary judgment for \$2,049.47.

The defendant appealed, upon the following grounds:—

1. That the indorsement was not a special indorsement within the meaning of Rule 245.

2. That the plaintiff should not have been allowed to supplement such indorsement by allegations upon affidavit.

3. That the indorsement shewed no cause of action whatever in the plaintiff Clarkson.

4. That the plaintiff could not sever his indorsement, and sign judgment for a portion of his demand.

5. That the interest charged in the indorsement was incorrect and excessive in amount.

And upon other grounds.

The appeal was argued before a Divisional Court composed of BOYD, C., and STREET and MEREDITH, JJ., on the 7th January, 1896.

F. A. Anglin, for the defendant.

A. R. Lewis, Q. C., for the plaintiffs.

Judgment was delivered on the 16th January, 1896.

BOYD, C.—Since the Bills of Exchange Act of 1890, on an overdue promissory note, interest may be specially indorsed for; and, according to the form, p. 963 of *Holmsted and Langton*, it may be simply claimed as “interest;” this means interest at six per cent. (the statutory rate); from the date of maturity, which is now given as liquidated damages. This point is settled by *McVicar v. McLaughlin*, 16 P. R. 450: see *Dando v. Boden*, [1893] 1 Q. B. 318.

Then it is argued that the indorsement should shew how, *i.e.*, through whose hands, the note came to the plaintiff, if he is an assignee of the note. It appears on the writ that Clarkson, the plaintiff, sues as liquidator of the Ontario Coal Company, and his co-plaintiff is the Lehigh Valley Coal Company.

The special indorsement is, first, for goods sold and delivered during the year 1894 to the defendant by the Ontario Coal Company, whereof the plaintiff Clarkson is liquidator, \$355.55. That is a good specially indorsed claim on the part of Clarkson; for the liquidator under the Winding-up Act may sue in his own name: *Smith v. Wilson*, 5 C. P. D. 25.

The next claims are on promissory notes made by defendant, giving dates, amounts, and time when payable, and concluding thus, “and assigned to the Lehigh Valley Coal Company, one of the plaintiffs herein.” That ap-

pears to be a good claim specially indorsed as to the plaintiff the Lehigh Valley Coal Company, though the way in which that company became assignee is not detailed. In the absence of any suggestion to the contrary, it will be taken that they are the legal holders of the notes.

By affidavit it appeared that the amount claimed in this action was assigned by the Ontario Coal Company to the Lehigh Valley Company in March, 1894, to be applied towards payment of moneys due from one company to the other.

And in April, 1894, the Ontario Coal Company went into liquidation under the Winding-up Act, and Clarkson was appointed liquidator. "It is alleged that the Lehigh Valley Company claim" a large balance from the liquidator in respect of the Ontario Coal Company, after applying the moneys now claimed from the defendant; but, however, this may be, the status of the company plaintiff is said to be mortgagee of the claims, and the liquidator to be transferee, subject to the co-plaintiff's claims.

Now, on motion for judgment, the function of the affidavits is to verify the cause of action stated in the special indorsement : *May v. Chidley*, [1894] 1 Q. B. at p. 453 : but the affidavits in this case shew that the special indorsement is not in conformity with the facts, and, therefore, fail to verify it. Now, it is not the practice to allow any amendment at the last moment in cases of application for summary judgment on specially indorsed writs. When the plaintiff comes to that stage, he must, as expressed by Wills, J., "have all his tackle in order !" *Paxton v. Baird*, 41 W. R. 88.

Nor can we, or should we, fall back on the special indorsement and give judgment as to one part in favour of the liquidator, and as to the other part in favour of the Lehigh Company; for it is repugnant to the construction put upon the Order as to special indorsement to permit two claims put together by two plaintiffs to be made the subject of a compound judgment, and in this case it would not be according to the actual rights of the plaintiffs to give judgment in such a form.

The order and judgment are vacated, with costs to be paid by plaintiffs and deducted from amount of the claim.

STREET, J.—I agree.

MEREDITH, J.—There is no denial of the debts; no pretence that the plaintiffs the coal company [are not entitled to immediate payment of them. The appeal is based entirely upon purely technical objections, objections to which effect ought not to be given if there be any fair way of escape from them.

The policy of legislation respecting the practice of the Courts for very many years has been, and is now, perhaps more than ever, to prevent the defeat or delay or hindrance of substantial rights by matters of mere form; and that has been the object of very many and frequent changes in the Rules; and was the one purpose of the very Rule in question. An instance of such policy and purpose is afforded by the speedy change in the Rules, in England, [Order 14, Rule 1 (b)], to avoid the effect of the decisions of such cases as *Wilks v. Wood*, [1892] 1 Q. B. 684, and *Sheba Gold Mining Co. v. Trubshawe*, *ib.* 674, and *Gurney v. Small*, [1891] 2 Q. B. 584; effects which, owing to the sedulous following of those cases in the higher Courts here, instead of adhering to the more convenient practice adopted in *Hay v. Johnston*, 12 P. R. 596, and followed for some length of time (see *Mackenzie v. Ross*, 14 P. R. 299), and now in force in England under that new Rule, must continue in this Province until legislation or a new Rule here gives relief. And it is satisfactory to observe that which some may be permitted to think a departure from the strictness of the decisions referred to in the very recent case of *Roberts v. Plant*, [1895] 1 Q. B. 597, which is also a decision upon the Rule now in question; if one may not also express his satisfaction with the provisions of the Law Courts Act, 1895, respecting the effect of judicial decisions.

In these circumstances, it may, unquestionably I think, be said that the applicant should be strictly confined to the grounds of his appeal set out in his notice of motion; and I decline to go beyond them to aid him; though, of course, quite ready to give effect to any of them which can be shewn to be fatal to the order in appeal.

Then, taking them in their order:—

The indorsement is a special indorsement within the meaning of the Rule 245; it is an indorsement in the very words of one of the forms referred to in the Rules, and given in the appendices, as far as the notes are concerned; and in respect of the claim for goods sold and delivered is as full, and gives quite as much information, enabling a defendant to “satisfy his mind whether he ought to pay or resist,” as the forms likewise prescribed for such cases. This ground of appeal is not specific enough, and, treated as technically as the defendant desires to treat the order, would be disregarded.

Then there is no need for supplementing that indorsement by any material used upon this application. The plaintiffs must, of course, shew that they are entitled to the judgment they seek—shew it as clearly as would be required at the trial. But there is no objection to the sufficiency of proof of the claim. The special indorsement is one requisite of the Rule; the proof of the claim is another. The whole claim must, under the cases referred to, be the subject of a, and included in the, special indorsement.

If it were necessary to amend, it would seem to me that not only might the Court permit an amendment, upon a motion for judgment in the presence of all parties, but would, in a case of this kind, be bound to do so; bound, if necessary, to allow all such purely formal alterations as would make the special indorsement satisfy the requirements of the most technical mind. “No proceedings shall be defeated by any formal objection” are the words of Rule 441; and we cannot, perhaps, too often read them and the Rules respecting amendments, which may and ought to be made “at any time * * for the advancement of

justice, determining the real question or issue raised by or depending on the proceedings, and best calculated to secure the giving of judgment according to the very right and justice of the case :” Rule 444.

The first object of the special endorsement has over and over again been stated to be, as it is, to enable a defendant to satisfy his mind whether he ought to pay or resist. But that cannot be the object of requiring it under the Rule in question, for, before an application such as this can be made, the defendant must have made up his mind to resist, as the application can be made only when resistance has been commenced, that is, after appearance. Then, what is such object ? The answer is, to confine the power to give speedy judgment to simple cases, to such claims as may be the subject of special indorsement, and are so indorsed. Then, having a claim which may be so made and is so indorsed, and the parties both before the Court on an application made under the Rule, why should not any amendment, in form only, be allowed ? And is not a refusal of any such reasonable amendment, in such a case as this, a plain disregard of the provisions of Rule 441 ?

The latest case in England, *Roberts v. Plant*, [1895] 1 Q. B. 597, supports this view, and sustains an amendment made, even *ex parte*, after summons for judgment taken out, and distinguishes such cases as *Gurney v. Small*, [1891] 2 Q. B. 584, and the other English cases to which I have referred, because, in them, there was no special indorsement ; or was an adding to the special indorsement of claims not the subject of such an indorsement, in the face of the warning given by the Court in the early case of *Rodway v. Lucas*, 10 Ex. 667 ; and so, as was said by Coleridge, C. J., in *Sheba Gold Mining Co. v. Trubshave*, [1892] 1 Q. B. 674, “they”—the plaintiffs—“must take the consequences.”

Paxton v. Baird, [1893] 1 Q. B. 139, the case in which Wills, J., made the observation about a plaintiff having all his tackle in order before taking out his summons, was also a case of that kind, and yet Coleridge, C. J., and he,

in that case, held that an amendment made, after summons taken out, striking out that portion of the claim which was not properly the subject of special indorsement, was regular, and sustained an order for judgment under the Rule in question.

We should certainly be as ready to follow the convenient and satisfactory practice established by the case of *Roberts v. Plant*, even if it necessitated a sharp turn, as the Courts here were to follow *Gurney v. Small* and the other cases to which I have referred, which rendered the practice so inconvenient that the Rules in England had to be at once amended to avoid their effect.

This ground, very technically dealt with, is also too indefinite.

Then, assuming that the indorsement shews no right of action in the plaintiff Clarkson, how is the defendant prejudiced? How does that prevent the special indorsement being in itself a good special indorsement? But does it not shew a sufficient reason for adding Clarkson? If the words "and assigned to the Lehigh Valley Coal Company" have reference to the promissory notes as well as the debt for goods sold and delivered, as they seem to, Clarkson would be a necessary party as payee of the promissory notes which had been assigned, but, so far as the indorsement shews, not indorsed over. But in any case, how can the defendant complain of the assignor joining with the assignee in the action upon the assigned claim? Is it not altogether in the defendant's interest, doing away with any question as to the fact or sufficiency of the assignment? If the plaintiffs are willing, why should the defendant object? See Con. Rule 300.

The fourth ground is based upon a mere slip of the Master in Chambers, as he informs us, in computing the amount of the plaintiffs' claim; a slip which can be set right on application to him: Rule 780.

And as to the last ground, the matter is one of computation, and has been correctly computed by the Master, as it would have been by the proper officer in case of judg-

ment in default of appearance: see *Hodges v. Callaghan*, 2 C. B. N. S. 306; and *Hughes v. Justin*, [1894] 1 Q. B. 667.

It is certain that there has been a want of ordinary care in the indorsement of the writ and in the drawing of the affidavits in support of this motion, giving encouragement to opposition to the motion below and to this appeal; want of care which ought to be discouraged; and, therefore, in my judgment, though this motion should be dismissed, it should be dismissed without costs.

RE BAGWELL—ANDERSON V. HENDERSON.

Administration—Summary Order—Executors and Administrators—Account.

More than a year after the grant of the probate to the sole executrix named in the will of the testator, three legatees applied summarily for an administration order, upon the ground that the executrix, who for several years before the death of the testator had managed his business affairs, had refused to account for her dealings with his moneys, and now claimed an allowance from the estate for her services before the death and as executrix, denying that any sum was due by her to the estate:—

Held, that the legatees were entitled to the usual administration order, under which the Master could make all the necessary inquiries; and were not driven to an action for administration.

[February 17, 1896.—STREET, J.]

THIS was an application by three legatees under the will of John Bull Bagwell, deceased, for the usual administration order. The application was made more than a year after the grant of probate to the defendant, Lucy E. Henderson, the sole executrix named in the will. The ground upon which it was made was that the defendant for several years before the death of the testator, and down to the time of his death, managed his business affairs for him and collected and disbursed large sums of money for him; that she had refused to produce her books of account containing the entries of her dealings with the moneys of the

deceased ; that the accounts had never been agreed to or settled ; and that the plaintiffs wished to investigate them.

The executrix had also claimed an allowance from the estate for services rendered to the testator in his life time, and an allowance for her services as executrix, both of which remained unsettled.

The application was heard by STREET, J., in Chambers, on the 14th February, 1896.

James Bicknell, for the plaintiffs.

Bruce, Q.C., for the executrix, opposed the making of an order upon motion, and contended that where the ground for the application is the existence of a debt due from the executrix to the estate, which she denies, the proper course is for the persons interested to bring an action and establish the fact ; citing *Re McDermott*, 29 L. R. Ir. 12 (1891) ; *Freakley v. Fox*, 9 B. & C. 130 ; *Simmons v. Gutteridge*, 13 Ves. 262 ; *Tomlin v. Tomlin*, 1 Ha. 236 ; *Yeatman v. Yeatman*, 7 Ch. D. 210 ; *Meldrum v. Scorer*, 56 L. T. N. S. 471 ; *Benningfield v. Baxter*, 12 App. Cas. 167 ; *Re Munsie*, 10 P. R. 98 ; *Merchants Bank v. Monteith*, *ib.* 458 ; *Re Morphy*, 11 P. R. 321.

Bicknell, in reply, cited *Burn v. Burn*, 8 O. R. 237, 255.

Judgment was delivered on the 17th February, 1896.

STREET, J.—I have looked into the cases referred to by counsel for the executrix, and I can find nothing in them which precludes me from granting the present application.

If the question at issue were one proper to be reserved to be dealt with at the hearing of the cause, as, for instance, whether a farm, or a block of stock, or a sum of money claimed by the executrix as having been given her by the testator, had really been so given, I quite agree that it might have been right to have the question tried at a hearing and not in the Master's office ; but here the question is purely a matter of account, involving a large number of items, amounting in all to some \$6,000, which must

necessarily have been referred to a Master as soon as a hearing was reached. Under these circumstances, the usual directions in an ordinary administration order will be sufficient to warrant the Master in making the inquiries necessary for determining whether the executrix has accounted for all the moneys of the testator which came to her hands during his lifetime as well as since his death; and I can see no reason for refusing such an order and for referring the applicants to the roundabout remedy of an action, which must result in a similar inquiry.

I therefore direct that the usual order be made for the administration of the estate of the testator, John Bull Bagwell, with a reference to the Master at Hamilton.

MONES & CO. v. McCALLUM.

Receiver—Administration Action—Status.

The right of a judgment creditor of a legatee or devisee under a will to bring an action for the administration of the estate of the testator is doubtful.

A receiver, appointed at the instance of a judgment creditor to receive the interest of the judgment debtor in the estate of his father for satisfaction of the judgment debt, was given leave to bring an action for administration, no opinion being expressed as to his status.

[February 20, 1896.—*Street, J.*]

AN *ex parte* application by the plaintiffs for an order authorizing a receiver appointed at their instance, to bring an action for the administration of an estate, under the circumstances mentioned in the judgment, was made before STREET, J., in Chambers, on the 14th February, 1896.

Douglas Armour, for the applicants.

Judgment was delivered on the 20th February, 1896.

STREET, J.—A receiver has been appointed at the instance of the judgment creditors, Mones & Co., to receive

the interest of the defendant McCallum in the estate of his deceased father, for satisfaction of the plaintiffs' debt. The receiver now applies for leave to bring an action for the administration of the estate of the father of the judgment debtor, as the sole acting executor of the estate refuses to give any definite statement of his dealings with the estate.

The right of a judgment creditor of a legatee or devisee to bring such an action, is certainly by no means clear, but the Court in *McLean v. Bruce*, 14 P. R. 190, upon appeal from Robertson, J., appears to have been inclined to think that it would lie, although *Elmslie v. McAulay*, 3 Bro. C. C. 624, leads to an opposite conclusion.

Without expressing an opinion as to whether a judgment creditor, under such circumstances, is entitled to obtain a judgment for administration, I think he should have leave to try his right to do so. The leave applied for by the receiver will therefore be granted, the consent of Mones & Co. being filed with the application for the writ of summons.

MARPLES V. ROSEBRUGH.

Vacation—Reference—Official Referee.

Every legal proceeding which may properly be taken out of vacation may with equal propriety be taken during vacation, unless something to the contrary can be found in some statute or Rule of Court. An official referee may proceed with a reference during vacation.

[February 26, 1896.—*Divisional Court.*]

ON 4th November, 1895, an order was made that this action and all questions and matters of account therein should be referred to James S. Cartwright, as an official referee, under sec. 101 of the Judicature Act.

On 23rd December, 1895, Mr. Cartwright, in the presence of representatives of both sides, appointed the 30th December for proceeding with the reference.

On 30th December counsel for both parties attended, but the defendant's counsel only appeared for the purpose of protesting against the reference being proceeded with during the Christmas vacation, and then left the room. The referee went on with the reference, notwithstanding the protest, in the absence of any one representing the defendant, and made his report.

The defendant appealed from the report upon the ground that evidence had been taken during the Christmas vacation without his consent and in his absence.

The appeal was argued on 27th January, 1896, before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.

The only points argued were whether the referee could properly proceed with the reference during vacation, and if he could not, whether the defendant had waived his right to object.

W. J. Elliott, for the defendant.

Shepley, Q. C., for the plaintiff.

On the 26th February, 1896, the judgment of the Court was delivered by

STREET, J.—I think it may be laid down as a general rule that every legal proceeding which may properly be taken out of vacation may with equal propriety be taken during vacation, unless something to the contrary can be found in some statute or Rule of Court.

I have been unable to find any statute or Rule leading at all to the conclusion that an official referee may not as well proceed with a reference to him during vacation as he undoubtedly may out of vacation. There may be some question under Rules 7 and 8, as to whether the offices of the Master in Ordinary and the Local Masters are to be kept open during vacation, but the doubt does not extend to official referees appointed to take references under secs. 101 and 102 of the Judicature Act. It is true that the referee in the present case is the Registrar of the Queen's Bench Division, and that his position of official referee is one of the consequences of his position of Registrar; and that the office in which he transacts his business of Registrar is only required to be kept open in vacation for two hours a day; but there is nothing to restrict the number of hours a day during which he may conduct his duties as an official referee, whether in or out of vacation.

In my opinion, therefore, the appeal from the report of the referee must be dismissed with costs.

DONNELLY ET AL. V. AMES ET AL.

Security for Costs—Appeal to Court of Appeal—Special Order—Judicature Act, 1895, sec. 77.

Under sec. 77 of the Judicature Act, 1895, security was specially ordered to be given by the plaintiffs, in the sum of \$200, on their appeal to the Court of Appeal from the judgment of the trial Judge dismissing their action for the recovery of land of which the defendants and those under whom they claimed had been in undisturbed possession for nearly thirty years, where two of the plaintiffs resided abroad, and the other two, who resided in this Province, had no property exigible under execution, the taxed costs in the Court below being unpaid, and execution therefor having been returned *nulla bona*.

[March 2, 1896.—*MacLennan, J.A.*]

MOTION by the defendants under sec. 77* of the Judicature Act, 1895, for a special order requiring the plaintiffs to give the defendants security for the costs of an appeal by the plaintiffs to the Court of Appeal from the judgment of MEREDITH, C. J., in favour of the defendants. The facts are stated in the judgment.

The motion was argued before MACLENNAN, J. A., in Chambers, on the 25th February, 1896.

Shepley, Q. C., for the defendants.

E. D. Armour, Q. C., for the plaintiffs.

Judgment was delivered on the 2nd March, 1896.

MACLENNAN, J. A.—This is a motion by the defendants, against whom the action has been dismissed, for security for costs of the plaintiffs' appeal to this Court from the judgment at the trial. It is an action for the recovery of land of which the defendants and those under whom they claim title have been in undisturbed possession for nearly thirty years. Two of the plaintiffs reside within the

*77. On an appeal to the Court of Appeal, from any court or judge,
* * no security shall be required for costs or damages, unless such security is specially ordered by the court to which the appeal is made or a judge thereof.

jurisdiction, and the other two reside abroad. The costs in the Court below have been taxed at \$310, and are still unpaid. Execution has been issued therefor, and the sheriff of Kingston, within whose bailiwick the plaintiffs who are within the jurisdiction reside, has made a return of *nulla bona*. It is also sworn on information and belief that they have no property within the jurisdiction which is exigible under execution. Under these circumstances the present motion is made under sec. 77 of the Judicature Act of 1895. The foregoing facts as to the means and property of the appellants who are within the jurisdiction are not denied or controverted, and I am of opinion that the case is one in which security ought to be ordered to the amount of \$200. The English Rule 879 is somewhat similar to ours, and I have examined the following decisions thereon, and they shew that the conclusion to which I have come is the proper one, without reference to any question as to the probable success of the appeal: *Rourke v. White Moss Colliery Co.*, 1 C. P. D. at p. 562; *Wilson v. Smith*, 2 Ch. D. 67; *Usil v. Brearley*, 3 C. P. D. 206; *Re Ivory*, 10 Ch. D. 372; *Waddell v. Blockey*, *ib.* 416; *Harlock v. Ashberry*, 19 Ch. D. 84; *Re Spencer*, 45 L. T. N. S. 396; *Farrer v. Lacy*, 28 Ch. D. 482; *Cowell v. Taylor*, 31 Ch. D. 34; *Re Briton Medical and General Life Association*, 2 Times L. R. 409; *Re Apollinaris Co.*, [1891] 1 Ch. 1; *Heckscher v. Crosley*, [1891] 1 Q. B. 224; *Bentsen v. Taylor*, [1893] 2 Q. B. 193.

ARMOUR V. MERCHANTS BANK OF CANADA.

Judgment—Petition to Open up—New Evidence—Forum—Rule 782.

An application to open up a judgment on the ground of newly discovered material evidence is provided for by Rule 782, and is properly made in Court to the Judge who tried the action, and is a proceeding in the cause.

[February 1, 1896.—*Boyd, C.*]

AN application by the plaintiff "for an order to rehear this action or for a new trial," upon the ground of newly discovered evidence, made to BOYD, C., who had tried the action and given judgment for the defendants.

The application was made on the 1st February, 1896.

Shepley, Q. C., for the defendants, objected that the application should be to a Divisional Court.

F. A. Anglin, for the plaintiff, cited *Synod v. De Blaquière*, 10 P. R. 11; *Bank of British North America v. Western Assurance Co.*, 11 P. R. 434; *Holmested & Langton's Judicature Act*, pp. 656-7.

BOYD, C.—This is an application to open up a judgment of mine pronounced in April, 1895, on the ground of newly discovered material evidence. Objection was made as to the jurisdiction. Neither counsel referred to Rule 782*, but that seems to me to provide for a case like this. It covers applications such as were the subject of bills of review on newly discovered materials under the old practice, and the scope of the whole is fully considered by Ferguson, J., in *Dumble v. Cobourg and Peterborough R. W. Co.*, 29 Gr. 121. This Rule is not referred to by Mr. Justice Proudfoot

*Any party entitled to the variation or reversal of a judgment or order, upon the ground of matter arising subsequent to the making thereof, or subsequently discovered, or to impeach a judgment or order on the ground of fraud, or to suspend the operation of a judgment or order, or to carry a judgment or order into operation, is to proceed by petition in the cause, praying the relief which is sought, and stating the grounds upon which it is claimed.

in the cases in 10 and 11 P. R. cited, but he dealt with the cases as upon the footing of the Order.

It is properly made in Court by the Judge who tried the case, and is a proceeding in the cause: see *Waterhouse v. Lee*, 10 Gr. at p. 193.

I overrule the preliminary objection, and will hear the petition on its merits; but it had better come on when I am taking the weekly Court.

RE THOMPSON.

Attachment of Debts—Assignment for Benefit of Creditors—Executions—Priorities—Sheriff—Creditors' Relief Act, sec. 37.

An assignment by an insolvent for the general benefit of his creditors does not oust a prior attachment by a creditor of the insolvent of a debt due to him.

Wood v. Joselin, 18 A. R. 59, followed.

Section 37, sub-sec. 3, of the Creditors' Relief Act must be construed to refer only to a case where the facts would entitle a sheriff, if there had been no attaching order issued by a creditor, to obtain one at his own instance, under sub-sec. (1) of sec. 37; and, to entitle him to such order, there must be in his hands several executions and claims, and not sufficient lands or goods to pay all and his own fees, and a debt owing to the execution debtor by a person resident in the bailiwick.

And where a debtor, who was entitled to certain insurance moneys, assigned them to his wife, who subsequently assigned them to her husband's assignee for the benefit of creditors, and such moneys were also attached by a creditor of the husband between the dates of the assignment to his wife and his assignment for creditors; and some months after these transactions, when the moneys were in Court awaiting the result of litigation between the assignee and the attaching creditor, two executions against the debtor came into the hands of the sheriff of the county in which the insurance company in whose hands the moneys were when attached had its head office:—

Held, that the moneys had ceased to be the property of the debtor, and, even if there had been no attaching order, the sheriff could not have obtained the moneys for the purpose of satisfying the executions.

Semble, also, that the provisions of sub-sec. (3) of sec. 37 should be read as confined to creditors having executions and claims in the sheriff's hands at the time of the attaching of the debt.

[October 1, 1895.—*Boyd, C.*]

[January 2, 1896.—*Meredith, J.*]

[January 17, 1896.—*Divisional Court.*]

ON the 15th March, 1895, J. W. Lang & Co., primary creditors, brought an action in the 10th Division Court

in the county of York against George Thompson, primary debtor, to recover the amount of two promissory notes, and attached certain insurance moneys in the hands of the Provincial Provident Institution, garnishees, a life insurance company having its head office in the city of St. Thomas, in the county of Elgin, as a debt due to Thompson by the garnishees.

On the 29th April, 1895, an order was made by STREET, J., permitting the garnishees to pay into the High Court certain moneys, as set out in the order, the moneys attached being part thereof, under which the moneys were paid in accordingly. The order declared that the payment into Court was not to prejudice the lien and claim of J. W. Lang & Co. upon the moneys so paid in, arising by virtue of their Division Court proceedings, and, further, that the order should not in any way affect the rights of Lang & Co. as to such moneys.

On the 28th January, 1895, George Thompson made an assignment to his wife of the insurance moneys due to him by the Provincial Provident Institution.

On the 6th April, 1895, Thompson made an assignment for the general benefit of his creditors, under R. S. O. ch. 124, to Eudo Saunders; and on the same day his wife assigned to Saunders her claim or right to the insurance moneys.

J. W. Lang & Co. and Eudo Saunders both made applications for payment out of Court of the moneys to which George Thompson had been entitled, and these applications were heard by BOYD, C., in Chambers, on the 30th September, 1895.

F. J. Travers, for J. W. Lang & Co.

W. H. Blake, for Eudo Saunders.

Judgment was delivered on the following day.

BOYD, C.—Following *Wood v. Joselin*, 18 A. R. 59, I hold that the assignment for creditors did not oust the

prior attachment of the debt on the policy. That being so, the only matter to be disposed of is whether the transferee of Mrs. Thompson, under the prior assignment from her husband (the debtor), has a claim superior to the creditors (Lang & Co.). That point was raised in the Division Court, and would have been investigated there, if proceedings had not been supposed to be arrested by the order of my brother Street. But that merely stays as to the insurance company, and leaves the issue between Lang and Saunders to be still disposed of. If the parties do not choose to go on there, it is competent to direct an issue in this Court to enable proper disposal of the fund to be made as between the attaching creditor and the transferee of Mrs. Thompson.

* When this issue is determined, it will settle the right to the money. Costs to follow the result of the issue, but on lower scale if parties do not go to the Division Court.

Upon this judgment an order was settled and issued in which it was declared that the assignment for the benefit of creditors by Thompson to Saunders did not oust the prior attachment of the debt on the policy by J. W. Lang & Co.; and it was ordered that proceedings pending in the Division Court between Lang & Co. and Saunders (as claimant) and others should be referred back to the Division Court Judge, to be worked out by him under secs. 188 and 197 and other appropriate sections of the Division Courts Act, with leave to Saunders to object to the status of Lang & Co., and with leave to Lang & Co. to make such answer thereto as they might be advised, and, generally, with leave to raise all such matters as might be open to any of the parties.

The matter coming up again in the Division Court, upon the reference back, Mr. Saunders (who was a solicitor) appeared for the primary debtor and his wife, one of the claimants, and admitted that the assignment to the latter was void as against creditors of the former. He also

appeared on his own behalf as a claimant, in the capacity of assignee for the benefit of the creditors of Thompson and of assignee of Mrs. Thompson's claim. The parties thus being before the Division Court, the Judge found that the assignment from the debtor to his wife was void as against creditors, and dismissed her claim as assignee without costs. He also dismissed Saunders' claim as assignee for creditors and of Mrs. Thompson's claim, following *Wood v. Joselin*, 18 A. R. 59; and stated that that left the fund in Court freed from any claim, as far as appeared before him, and, as it was admitted to be the money of the primary debtor, due from and paid in by the garnishees, he then gave judgment in favour of the primary creditors against the garnishees with costs. That judgment was given on the 2nd November, 1895.

On the 25th November, 1895, two executions against the goods of George Thompson came into the hands of the sheriff of Elgin, who on the 29th November, 1895, gave notice of an application for payment out to him of the fund in Court.

That application was heard by MEREDITH, J., in Chambers, on the 6th December, 1895.

George Kerr, for the sheriff.

W. H. Blake, for Saunders.

F. J. Travers, for Lang & Co.

Judgment was delivered on the 2nd January, 1896.

MEREDITH, J.—The case in the Division Court was one of garnishee proceedings before judgment. Mr. Lang, trading under the name of Lang & Co., attached the debt in that Court before judgment, and "the money so attached" is the money, now in this Court, the subject of this application. And so the case comes within the very words of sec. 37, sub-sec. (5), of the Creditors' Relief Act,*

* 37.—(1) Where there are in the sheriff's hands several executions and claims, and there are not, or do not appear to be, sufficient lands or goods, as the case may be, to pay all and his own fees, he may apply for

which section also provides—sub-sec. (3)—that moneys attached shall be deemed to be attached for the benefit of all creditors entitled under that Act, and that payment shall be made to the sheriff for that purpose.

Then why should effect not be given to the plain words of the Act?

Because, it is said, that section of the Act applies only to cases in which there are executions in the hands of the sheriff of the county in which the garnishee resides, and that there were no such executions at the time when the garnishee summons in the Division Court was served. But even if it be said that the whole of the section is limited as sub-sec. (1) is, yet why should effect not be given to the sheriff's claim? He is sheriff of the county in which the garnishee resides, and executions against the primary debtor are in his hands, and the debt attached is in Court; the attaching creditor has never reached it. If it be needful that executions be in the hands of such sheriff, I can perceive no reason why—having regard to the purposes of the enactment—it is not enough if the executions be in his hands before the attaching creditor receives the money; sub-sec. (6) provides protection to a garnishee in case of payment to the attaching creditor under an order of Court, and who pays into

an order attaching any debt owing to the execution debtor by any person resident in the county of such sheriff, whether the debt is owing by such person alone or jointly with another person resident or not resident in such county, and to procure the attachment the sheriff may take the same proceedings as a creditor: and in such case a writ of execution, or other writ in the course of the proceedings, may be directed to him in the same manner as if the attachment were by a creditor; and the proceeds of the debts attached shall be distributed in the same manner as if he had realized the same under execution.

(2) In case the sheriff does not take such proceedings, any person entitled to distribution may take the same for the benefit of himself and all other persons entitled to distribution as aforesaid, and the person owing the attached debt shall pay the same to the sheriff.

(3) Any judgment creditor who attaches a debt shall be deemed to do so for the benefit of himself and all creditors entitled under this Act; payment of such debt shall be made to the sheriff, who in making distribution will apportion to such judgment creditor a share *pro rata*, according

Court without notice that the sheriff is entitled, but gives the right to the sheriff to recover the money from the attaching creditor.

Again, it is said that the case of *Wood v. Joselin*, 18 A. R. 59, is a direct authority in favour of the attaching creditor's claim, and that it was followed by the Chancellor in the order made by him in this matter, dated 30th September, 1895; but, whatever may be said of that case, it is plainly distinguishable, for here the applicant's claim is made under and based entirely upon the provisions of the Creditors' Relief Act; there that Act was, as the judgment expressly states, not at all applicable, there being no execution against the primary debtor in the hands of any sheriff: see p. 62. I am not, therefore, called upon to consider the question determined in that case, as otherwise I might have felt called upon to do, because that judgment was one against which there was no appeal, being a judgment in appeal in a Division Court action.

And, again, it is said that the applicant is bound by the order herein of the 30th September, 1895, and that under it the attaching creditor's right to the fund to the extent of his claim is established; or, at all events, that the judgment upon which that order is based upholds the attaching creditor's claim, and that it ought to be followed on this application, even if the order is not binding on the

to the amount owing upon his judgment, of the whole amount to be distributed under the provisions of this Act, but such share shall not exceed the amount recovered by the garnishee proceedings unless the judgment creditor has placed a writ in the sheriff's hands.

(4) Money garnished and paid into the sheriff's hands shall be deemed to be money levied under execution, within the meaning of this Act, except that, unless the garnishee proceedings were taken by him, the sheriff shall only be entitled to charge poundage on such moneys at the rate of one and a quarter per cent.

(5) The provisions of sub-sections 3 and 4 of this section shall also apply, as nearly as may be, to any person who attaches a debt in the Division Court before judgment, and to the money so attached.

(6) In case a garnishee, under an order of the Court, pays to the attaching creditor, or in case a garnishee, without notice that the sheriff is entitled, pays the amount of his debt into Court, and the same is paid out to the said creditor, the sheriff may recover from him the amount so received.

present applicant; but neither that order nor that judgment can affect the rights of the present applicant, if he have any which have not passed to the assignee for creditors, because the assignee only, and not the present applicant, was a party to that application. Neither the order nor the judgment professes to deal with the claim now made, nor with any right under the Creditors' Relief Act. What the Chancellor decided—so far as any right to the fund was dealt with—on that application is stated in these words: "Following *Wood v. Joselin*, 18 A. R. 59, I hold that the assignment for creditors did not oust the prior attachment of the debt on the policy:" there is not a word in the judgment or order indicating that the Creditors' Relief Act, or any rights or claims under it, were considered or made; on the contrary, in following *Wood v. Joselin*, it would seem that the learned Judge considered the Creditors' Relief Act inapplicable, for, as I have before stated, *Wood v. Joselin* is expressly stated, by the learned Judge who decided it, to have been a case to which that Act could not apply, there being no execution in the hands of any sheriff. But, whatever may have been the intention of the learned Chancellor, if the right of the sheriff under the Creditors' Relief Act passed to the assignee under the Act respecting Assignments and Preferences by Insolvent persons, the order made by him—the order of 30th September, 1895—would preclude this claim, and that order should be appealed against if creditors are dissatisfied with its effect. So I am called upon to determine that question; and I start with the declaration, made at the attaching creditor's instance and upon his application, in the order of 30th September, 1895, that the assignment did not oust this creditor's rights, that is, that it does not take precedence over the attachment; and if *Wood v. Joselin* were rightly decided, I would be inclined to agree in that conclusion, for I find nothing except the 9th section of the last mentioned Act, the section under consideration in that case, and which provides that the assignment "shall take precedence of all judgments and of all executions not com-

pletely executed by payment," which could give to the assignee any right of the sheriff under the Creditors' Relief Act. It is true that sec. 37 of that Act provides—sub-sec. (4)—that moneys garnished and paid into the sheriff's hands shall be deemed to be moneys levied under execution, but that is limited by the words "within the meaning of this Act," if otherwise they would affect the question.

The case then may be shortly stated thus:—According to *Wood v. Joselin*, and under the order of 30th September, 1895, the moneys attached did not pass to the assignee; the attaching creditor's rights prevented that; the assignee took the fund subject to them: then under sec. 37, sub-sec. (5), of the Creditors' Relief Act, payment of the moneys attached is to be made to the sheriff for distribution under the provisions of that Act; and, according to the order of 30th September, 1895, such right of the sheriff did not pass to the assignee; it therefore remained in him, the attaching creditor having a right to payment of his costs, under the provisions of sec. 26 and sec. 37, sub-sec. (4), out of the moneys attached, in priority to creditors' rights to a ratable distribution of them.

Executions in a sheriff's hands are, of course, not superseded by an assignment under the Act; they still remain there in full force, and are enforceable against any exigible property of the debtor which does pass to the assignee.

It would be strange indeed, if an assignment made under the provisions of an Act made expressly to prevent one creditor getting priority over others, could be held to give that very priority in a case where but for such assignment the Creditors' Relief Act would have prevented it.

The assignment to the wife cannot stand in the way; that is fraudulent and void as to all creditors; and, besides, any claim under it is now given up.

I can perceive no good reason for refusing to give to the words in question of the Creditors' Relief Act their full natural and grammatical meaning and effect, especially where such meaning and effect are, as here, entirely in

accord with the general intent and purpose of the whole enactment: see *Dawson v. Moffatt*, 11 O. R. 484.

My conclusion is that the applicant is entitled, under the provisions and for the purposes of the Creditors' Relief Act, to all the moneys in Court to the credit of this matter to which the primary debtor was absolutely entitled.

The moneys are in Court, and great care should be taken that they are paid out only to the person rightfully entitled to them, and the questions involved are important ones.

Before any order goes, there must be an inquiry, which may be made by the clerk in Chambers, for determining the amount of the fund to which the primary debtor was so entitled, and whether any other claims upon it, for I must decline to make any order for payment out on the mere assertions of the parties making this claim, that the debtor was entitled to so much, and the more so as it appears that infants, not parties to this motion, are concerned in the fund.

Upon that being done, the order may go for payment out of Court to the sheriff, under and for the purpose provided for in the Creditors' Relief Act, of the proper amount so ascertained, less the costs of all parties of this motion, and the costs of the attaching creditor in the Division Court: see sections 26 and 24: or—having regard to the different rights of appeal from a Chambers order and from a judgment at the trial—if the parties desire it, they may have an issue tried to determine the question of right to the fund.

J. W. Lang & Co. appealed from the decision of MEREDITH, J., and their appeal was heard by a Divisional Court composed of BOYD, C., ROSE, J., and ROBERTSON, J., on the 15th January, 1896.

W. R. Riddell and *F. J. Travers*, for the appellants.

Rowell, for the sheriff of Elgin.

W. H. Blake, for Eudo Saunders.

Judgment was delivered on the 17th January, 1896.

ROSE, J.—(after stating the facts as above)—It would seem clear that, as between the assignee, Saunders, and the primary creditors, Lang & Co., the rights of the parties had been determined by the order of His Honour Judge Morson, and that the status of the primary creditors had been established, and that the matter was thus *res adjudicata*. It will also be observed from the above statement that while the assignment from the debtor to his wife was held to be void as against creditors, neither the assignment from the wife to Saunders, nor the assignment from the debtor to Saunders for the benefit of creditors, was impeached or declared invalid. It would, therefore, follow that the assignment for the benefit of creditors, apart entirely from any question that might be raised as to the validity of the assignment from Mrs. Thompson to Saunders, was, as between the parties to the litigation in the Division Court, a valid assignment, and passed the title to the moneys thereby assigned, from the debtor to Saunders, subject, however, to the rights of the primary creditors as to so much of such moneys as would be sufficient to satisfy their claim, which was declared to be superior to those of the assignee. The assignment for the benefit of creditors was made on the 6th April, 1895. The assignment to Mrs. Thompson was made on the 28th January, 1895. Our learned brother has held that the application of the sheriff is entitled to prevail, on the ground that, on the proper construction of sec. 37, the attachment of the debt inured to the benefit of creditors, and that the sheriff's rights were declared by that section.

I am of the opinion that sec. 37 must be construed to refer only to a case where the facts would entitle a sheriff, if there had been no attaching order issued by a creditor, to obtain an attaching order at his own instance, under the provisions of sub-sec. (1) of sec. 37; and to entitle the sheriff to any such attaching order, it is mani-

fest that there must be in his hands several executions and claims, and not sufficient lands or goods to pay all and his own fees, and a debt owing to the execution debtor by a person resident in the county of such sheriff. I think that there is no such case here, for, when the executions came into the hands of the sheriff, the moneys in question were not a debt owing to the execution debtor by the company, for such moneys belonged either to the primary creditors, or, if the subsequent provisions of the section prevent that being so held, they belonged to the assignee, either under the assignment from Mrs. Thompson, or the assignment from the debtor for the benefit of creditors.

It may be also, as argued by Mr. Riddell, that the benefit of the provisions of sub-sec. (3) of sec. 37 must be read as confined to the creditors entitled under the Act at the time of attachment within the meaning of the provision of sub-sec. (1) of sec. 37, that is, creditors having executions and claims in the sheriff's hands at the time of the attaching of the debt, and this argument may be supported by reference to the provisions of sub-sec. (6) of sec. 37, which, read with the provisions of sub-sec. (3), would apparently work an absurdity, if the language of the section is to be read as of general application. It would be anomalous in this case if, where it is clear that upon the facts before us, as between the parties, the assignment to Saunders does prevail over the rights of the sheriff, and where the attaching creditor has been declared to have a superior title to that of the assignee for the benefit of creditors, the sheriff should be enabled to take the moneys away from the attaching creditor; but I think it best in this case to rest my opinion upon the ground that at the time that the rights of the sheriff under the statute arose to realize out of the property of the debtor any executions in his hands, this money was not of the property of the debtor, but had ceased to be his property, and that, even if there had been no attaching order, the sheriff could not have obtained this money for the purpose of satisfying executions in his hands.

For these reasons I am of the opinion that the order appealed from cannot be sustained, and must be reversed. All parties claiming any right to the money being before the Court, counsel agreed that we might make such final order now as to us appeared warranted ; and, following the opinion that I have just given, I think that the order must be for the payment out of Court to the primary creditors of a sum sufficient to pay their claim and costs, including the costs of this motion and the motion below, and the balance, if any, to be paid to the assignee for the benefit of creditors. If such sum is not sufficient to pay the claim of the primary creditors and the costs, the order should be for the payment of any costs not thus satisfied, by the sheriff and by the assignee for the benefit of creditors.

BOYD, C.—I concur in the result.

ROBERTSON, J.—I concur.

SMITH ET AL. V. LOGAN ET AL.

Judgment—Appearance—Default—Tender—Notice.

On the day after the last day for appearance to a specially indorsed writ, the plaintiffs' solicitor attended before the officer of the Court to enter judgment for default, and while the latter was engaged in entering it, but before the stamps had been affixed, the defendant's solicitor came in with an appearance, which he tendered to the officer, informing him what it was. The officer, however, disregarded the appearance, and completed the entry of the judgment:—

Held, per ARMOUR, C. J., that the judgment was regular; for the officer, being seized of the business of entering the judgment, was not obliged to give it up to attend to the appearance.

Per FALCONBRIDGE, J., that the appearance, if received after the time limited, and without the notice required by Rule 281, would be something which the plaintiffs' solicitor would not be bound to regard, if he had made search in due time and found no appearance.

Per STREET, J., that by the tender of the appearance in the presence of the plaintiffs' solicitor, the officer was stayed in his right to enter judgment, and the judgment which he proceeded to enter was irregular; and he could not proceed again to enter judgment, even if no notice of appearance were served, until the time for service, that is the whole of the day of appearance, had expired.

[January 22, 1896.—*Divisional Court.*]

AN appeal by the plaintiffs from two orders of the senior local Judge at London, in Chambers; the first being an order, made upon the application of the defendant Wilson, directing that a judgment for the plaintiffs, entered upon default of appearance, for the amount of a money demand, upon a specially indorsed writ of summons, should be set aside for irregularity; and the second, an order dismissing an application by the plaintiffs to "confirm" such judgment, or, in the alternative, for leave to enter judgment.

No appearance having been entered by either of the defendants within the time allowed by the Rules, the plaintiffs' solicitor, on the day following the last day for appearance, attended before the proper officer to enter judgment. The judgment was drawn up, and the officer was proceeding to enter it and was engaged in entering it, but the necessary law stamps had not been affixed, when the solicitor for the defendant Wilson came in with an appearance, which he tendered to the officer, telling him what it was. The officer, however, completed the entry of

the judgment, notwithstanding the tender of the appearance.

Upon the application to set aside the judgment, affidavits were filed shewing what had taken place upon the entry of the judgment; and upon the application to "confirm" the judgment, the plaintiffs filed an affidavit such as is used upon a motion for summary judgment under Rule 739, and the defendant Wilson filed affidavits in answer by which he sought to shew a good defence upon the merits.

The appeal was argued before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 22nd January, 1896.

Aylesworth, Q. C., for the plaintiffs, contended that the judgment was regularly entered; and that the appearance at any rate, was ineffectual without a notice of appearance under Rule 281,* citing *Smith v. Dobbin*, 3 Ex. D. 338; *Hunter v. Wilcockson*, 9 P. R. 305; but if the judgment was not regularly signed, and the appearance was regularly entered, the plaintiffs were entitled to judgment under Rule 739, the affidavits filed by the defendant Wilson not shewing a good defence. The judgment was, at all events, regular as against the defendant Logan, and should not have been set aside as against him.

W. H. Blake, for the defendant Wilson, contended that, as under Rule 281 a defendant may appear at any time before judgment, it was the duty of the officer to receive the appearance when it was tendered before the act of entering judgment was completed. He cited and relied on *Fralick v. Huffman*, 1 C. L. Chamb. R. 80, and *Harris v. Andrews*, 3 U. C. L. J. O. S. 31.

Judgment was delivered on the same day.

*A defendant may appear at any time before judgment. If he appears at any time after the time limited for appearance, he shall, on the same day, give notice thereof to the plaintiff's solicitor * * and if the defendant appears after the time appointed by the writ, and omits to give such notice of his appearance, the plaintiff may proceed as in case of non-appearance.

ARMOUR, C. J.—In my opinion the judgment was regular. The clerk, being seised of the matter of entering the judgment, was not obliged to give it up to attend to the appearance. He had a right to deal with the case in the way he did—to conclude the plaintiffs' business before he began the defendant's. To hold otherwise would be to reverse the maxim *vigilantibus non dormientibus lex subvenit*. The plaintiffs' appeal against the order setting aside the judgment should be allowed with costs here and below, and the judgment, and the execution and attaching order founded thereon, should be restored. The defendant Wilson should, however, be allowed to defend upon the same terms as were imposed in *Merchants' Bank of Canada v. Scott*, 16 P. R. 90*n*; and the costs of the application below to confirm the judgment should be costs in the cause.

STREET, J.—In my opinion, the affidavits shew that the judgment had not been entered when the defendant's solicitor tendered the appearance to the officer; I think the officer's duty was to receive it when tendered, the nature of it having been made known to him. The officer after such tender, I think, had no right to proceed with the entry of judgment.

By the tender of the appearance in the presence of the plaintiffs' solicitor he was stayed in his right to enter judgment, and the judgment which he proceeded to enter was irregular.

Whether he could have proceeded on the next day to enter judgment, notice of the appearance not having in the meantime been served, may be open to much question, looking at the terms and object of the Rule, but I think it clear that he could not do so until the time for serving the notice had expired. I think speedy judgment could not be given upon these affidavits, and that the judgment entered should, therefore, be set aside with costs to the defendant Wilson in any event, and that the defendant Wilson should have costs of both appeals here in any event.

FALCONBRIDGE, J.—I agree with my lord the Chief Justice in his disposition of the appeal.

I am of opinion that the appearance, if received after the time limited, and without the notice provided by Rule 281, would be something which the plaintiffs' solicitor would not be bound to regard, if he had made search in due time, and found no appearance. This is my recollection of the old practice, and I see nothing in the new Rules to change it.* The plaintiffs were thus not bound to wait a whole day for notice to be served on them.

[Leave to appeal granted by the Court of Appeal.]

MADIGAN v. FERLAND.

Venue—Change of—Convenience—Preponderance.

Upon appeal by the defendant, in an action alleging fraud in the adjustment of partnership accounts and for an account, from an order of a Judge affirming an order of a Master refusing to change the venue from Toronto to Sault Ste. Marie, the Court was divided in opinion.

Per ARMOUR, C. J.—The venue should be changed, because the action could be more fitly and conveniently tried at Sault Ste. Marie.

Per STREET, J.—The defendant had not shewn so great a preponderance of convenience in favour of the change as was necessary under the authorities, especially in view of the previous refusals by the Master and Judge. *Peer v. North-West Transportation Co.*, 14 P. R. 381, referred to.

[February 20, 1896—*Divisional Court.*]

THIS was an action brought by the plaintiff against the defendant, with whom he was formerly in partnership, asking for payment of the sum of \$1,006.50, which he alleged the defendant obtained from him by fraud in adjusting their partnership accounts, in two sums of \$500 and \$506.50; asking also for payment of certain liabilities of the partnership which he alleged the defendant should have paid, but which he, the plaintiff, was compelled to pay; and for an account generally of the dealings between the plaintiff and the defendant under the agreement between them.

The defendant denied that he obtained the said sum of

* See *Hudson Bay Co. v. Hamilton*, 13 P. R. 461.

\$1,006.50 from the plaintiff by fraud; he stated that the accounts between him and the plaintiff had never been wound up; he explained the circumstances under which he obtained the \$1,006.50, as arising out of and involving matters of mere account between the parties; and he charged that the plaintiff was guilty of fraud in connection with the creation of the debts which he alleged he had paid, and which he sought to recover from the defendant; and he asked that upon the taking of the accounts between him and the plaintiff an allowance should be made to him for services since the attempted adjustment of accounts.

The plaintiff lived at Mount Forest, in the county of Wellington; the defendant at Sault Ste. Marie, in the district of Algoma; the transactions out of which the claim arose took place at or near Sault Ste. Marie.

The venue was laid at Toronto, and the defendant applied to the Master in Chambers to change it to Sault Ste. Marie, alleging a preponderance of convenience there. The plaintiff opposed the motion, alleging numerous witnesses living at points much nearer to Toronto than to Sault Ste. Marie. The defendant replied, contesting the facts set out by the plaintiff. The learned Master refused to change the venue.

The defendant thereupon appealed to MEREDITH, C. J., sitting in Chambers, and his appeal was dismissed, no written judgment being delivered.

During the Hilary Sittings of the Divisional Court, 1895, the defendant appealed from the judgment of MEREDITH, C. J., and the appeal was argued on 6th February, 1895, before a Divisional Court composed of ARMOUR, C. J., and STREET, J.

Douglas Armour, for the defendant.

Osler, Q. C., for the plaintiff.

Judgment was delivered on the 20th February, 1896.

STREET, J.—(after setting out the facts as above).—The pleadings seem to disclose two classes of matters in

difference between the parties ; the larger class is composed of matters of account, pure and simple, which must undoubtedly be referred to a Master ; and the other and the smaller class is made up of matters which, in all probability, will also be referred. The latter class consists of certain matters with respect to which fraud is charged ; but the charges of fraud appears to be so intimately connected with matters of account as to be incapable of being tried apart from them. If this is found to be the case, then it is plain that there is complete jurisdiction to refer the whole : *Sacker v. Ragozine*, 44 L. T. N. S. 308.

The onus lies upon the defendant who moves to change the venue, to shew a great preponderance of convenience in favour of the change asked for. The affidavits filed upon the motion do not shew the issues upon which the witnesses sworn to be necessary are to be called. They may or may not be required upon the only issues that can possibly be disposed of at the trial of the action.

In any event, I cannot gather from the affidavits that the defendant has shewn so great a preponderance of convenience in favour of the motion as is necessary under the authorities to justify us in ordering the change asked for, especially in view of the fact that the Master in Chambers and the Chief Justice of the Common Pleas have refused to grant it : *Peer v. North-West Transportation Co.*, 14 P. R. 381.

In my opinion, the motion should be dismissed with costs to be costs in the cause.

ARMOUR, C. J.—I am unable to agree with the judgment of my brother Street, for I think, upon the evidence before us, that this action can be much more fitly and conveniently tried at the town of Sault Ste. Marie, where the partnership was entered into, where the partnership business was carried on, where the cause of action, if any, arose, and where the partnership firm resided ; and, as we differ, the motion will be dismissed, and the costs will be costs in the cause.

TODD V. RUSNELL.

Divisional Court—Appeal to—Stay of Proceedings—Rule 799A (1484).

A Divisional Court has jurisdiction to allow an appeal from the judgment of a trial Judge to be set down upon short notice of motion, and to stay proceedings pending the appeal.

[March 16, 1896.—*Divisional Court.*]

AN application by the plaintiff to the Master in Chambers for an order to postpone the trial of the action, on the ground of the absence of a necessary and material witness, was enlarged to be heard before the trial Judge.

The case was on the peremptory list for the 12th March, 1896, when the motion to postpone was renewed before the trial Judge, MEREDITH, J., who dismissed it, and directed the action to be called on for trial. The action had been previously tried, but had been reopened for the purpose of enabling the plaintiff to adduce further evidence. The counsel for the plaintiff stated that, by reason of the failure of his application to postpone the trial, he was unable to adduce any further evidence, and the trial Judge thereupon dismissed the action.

On the following day the plaintiff served notice of motion, returnable before a Divisional Court on the 16th March, for leave to set the case down by way of appeal from the order dismissing the application to postpone the trial, and from the judgment dismissing the action, and for a stay of proceedings.

On 16th March, 1896, before a Divisional Court composed of MEREDITH, C. J., and ROSE and STREET, JJ., *J. W. McCullough*, for the plaintiff, supported the motion.

Marsh, Q. C., for the defendant, objected that the Court had no jurisdiction to make the order for which the plaintiff asked. If the plaintiff desired to obtain a stay of proceedings, he must obtain it upon application to the trial Judge, or by way of appeal from a refusal of the trial Judge to grant such stay; or he might, upon the authority of *Western*

Bank v. Courtemanche, 16 P. R. 513, obtain a stay by setting the case down before a Divisional Court in the regular way after complying with the provisions of Rules 799A and 799A (b) (1484). He relied upon the judgment of a Divisional Court of the Chancery Division, consisting of Ferguson, Robertson, and Meredith, JJ., in the similar case of *Neville v. King*. Judgment therein was given on the 4th June, 1895, and a note thereof appeared in the morning newspapers of the following day. Mr. Justice Ferguson said:—"The motion is a mere method of obtaining a stay of proceedings—an indirect appeal from the refusal of the trial Judge to stay proceedings." Mr. Justice Meredith said:—"I go further. This Court has no power to grant the motion. We cannot shorten the time for giving notice. The plaintiff is entitled to hold his judgment unless it is moved against in the regular way on seven days' notice before the next sittings. Nor is there power to stay proceedings, except upon an appeal in the regular way from the refusal of the trial Judge." It is desirable that there should be a settled and uniform practice upon the point.

McCullough was not called on in answer to the objection.

MEREDITH, C. J.—It has long been the settled practice of the Common Pleas Division to allow cases to be set down by way of appeal before the Divisional Court, where the judgment has been given too late to enable the appellant to get down to the next Sittings of the Divisional Court by complying with the provisions of the former Rule 798, now supplanted by Rules 799A and 799A (b), as introduced by Rule 1484. We see no reason to doubt our jurisdiction to allow the case to be set down upon the general list of appeals to be heard when it comes up in its regular turn, and to stay proceedings pending the motion.

ROSE and STREET, JJ., concurred.

MULLER V. GERTH.

Particulars—Slander.

In an action of slander the defendant has a right to the fullest particulars the plaintiff can furnish as to the place where, the time when, and the person to whom the words alleged were uttered; and also to full particulars of the names of the persons who have ceased business dealings with the plaintiff on account of the slander.

Shifts and uncertain particulars, such as are rendered meaningless and evasive by saying "among others" and "some of the persons," are to be discouraged.

The plaintiff is bound to give definite information, so far as he can, and to stop there; if further information comes to his knowledge, he can obtain leave to amend.

The defendant is entitled to particulars of slanderous statements alleged merely as matters shewing express malice or in aggravation of damages.

[March 3, 1896.—*Divisional Court.*]

AN appeal by the defendant from an order of the Master in Chambers requiring the plaintiff to deliver certain particulars of the statement of claim, in so far as such order refused to require the plaintiff to deliver certain further particulars demanded by the defendant.

The action was for slander. The statement of claim alleged three definite slanders in paragraphs 2, 3, and 4, respectively, and the particulars ordered and furnished stated that those alleged slanders were published at the city of Toronto, during the months of July, August, and September, 1895, to a specified person, "and others." Paragraph 6 alleged certain other similar slanders to have been uttered, without giving the language or the names of the persons to whom such slanders were uttered, or the places where or the times when they were uttered. These slanders were stated to be pleaded merely as evidence of malice. Paragraph 7 alleged special damage by loss of customers, etc., and the particulars of it as furnished were, "among the customers lost by the plaintiff," etc. The defendant on affidavit denied all knowledge of any of the slanders complained of, and swore that he was advised that it was unsafe for him to plead without better particulars. The plaintiff filed an affidavit in answer stating that he was unable to give the particulars sought.

The appeal was argued before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 2nd March, 1896.

F. A. Anglin, for the defendant. The particulars furnished are insufficient as to paragraphs 2, 3, and 4. The defendant is entitled to have particulars at least fixing a definite time and place: *Thornton v. Capstock*, 9 P. R. 535; *Winnett v. Appelbe*, 16 P. R. 57. The defendant denies knowledge; even if he had knowledge, it would be no answer to a demand for particulars: *Paterson v. Dunn*, 14 P. R. 40; Odgers on Libel and Slander, 2nd ed., p. 534. The English practice requires the names of all persons to whom the slanders were uttered to be specified: *Roselle v. Buchanan*, 16 Q. B. D. 656. Particulars should be as specific as an indictment: *Zierenberg v. Labouchere*, [1893] 2 Q. B. at p. 187; *Turnock v. Sartoris*, 33 Sol. J. 58. The plaintiff cannot defer particulars in order to fish out a case by discovery: *Zierenberg v. Labouchere*, *supra*; *Williams v. Ramsdale*, 36 W. R. 125; *Humphries v. Taylor*, 39 Ch. D. 693; *Hennessy v. Wright*, 24 Q. B. D. at p. 448n.; *Yorkshire Provident Life Assurance Co. v. Gilbert*, [1895] 2 Q. B. 148. The defendant's affidavit is sufficient to entitle him to further particulars: *Blackie v. Osmaston*, 28 Ch. D. 119. Unless particulars are given of the slanders alleged in paragraph 6, it should be struck out. Malice in fact is not an issue unless privilege is pleaded: Odgers, 2nd ed., p. 277. The word "among" should be struck out of the particulars of paragraph 7. The order should not allow delivery of further particulars at any time before trial without special application for leave.

W. N. Ferguson, for the plaintiff. The particulars furnished of paragraphs 2, 3, and 4 are the best the plaintiff can give. He has so sworn, and should not be ordered to do what is impossible: *Winnett v. Appelbe*, 16 P. R. 57. These particulars are sufficiently specific. Paragraph 6 is not pleaded as a cause of action, but simply as evidence of malice. The plaintiff would be entitled to give the evidence without pleading it. The defendant is not entitled

to these particulars. As to paragraph 7, there are other customers not yet known to the plaintiff.

On the following day the judgment of the Court was delivered by

STREET, J.—In my opinion, the practice establishes the defendant's right to have from the plaintiff the fullest particulars the plaintiff can furnish as to the place where, the time when, and the person to whom the words alleged were uttered ; he is also entitled to full particulars of the names of the persons who have ceased business dealings with the plaintiff on account of the slander.

I think any practice allowing a plaintiff to deliver shiftty and uncertain particulars is to be discouraged, such particulars, I mean, as are rendered meaningless and evasive by saying "among others," and "some of the persons," and similar expressions. The plaintiff is bound to give definite information so far as he can and to stop there ; if further information comes to his knowledge later on, he can readily obtain leave to amend the particulars delivered in most cases, upon shewing that he has obtained new information since delivering his former particulars. The plaintiff swears that he has given all the particulars in his power with regard to paragraphs 2, 3, and 4, and I think the defendant must be satisfied with what he has got so far as those paragraphs are concerned.

I think the defendant is entitled to particulars of the slanderous statements alleged by the plaintiff in paragraph 6 ; he has given particulars as the alleged "groundless actions," and is bound by them. I do not think it is any answer to the defendant to say that he does not intend to ask for damages in respect of them ; he relies on them as matters shewing express malice or as an aggravation of his damages ; in either view they are "material" facts, and should be pleaded.

I think the defendant is entitled to have the particulars of 19th February, 1896, limited by striking out the word "among" with which the paragraph opens.

The costs of the appeal will be costs in the cause.

MULHOLLAND V. MISENER.

Discovery—Examination of Party—Criminal Conversation—R. S. O. ch. 61, sec. 7.

In an action for criminal conversation with the plaintiff's wife, the defendant cannot be compelled to submit to examination for discovery. Construction of sec. 7 of R. S. O. ch. 61, and difference between it and sec. 3 of the Imperial Act 32 & 33 Vict. ch. 68 pointed out.

[September 24, 1895.—*MacMahon, J.*]

MOTION by the plaintiff to strike out the statement of defence in an action for criminal conversation with the plaintiff's wife, on the ground of the defendant's refusal to be sworn or be examined before a special examiner for the purpose of discovery.

The motion was argued before MACMAHON, J., in Chambers, on the 23rd September, 1895.

McBrayne, for the plaintiff.

D'Arcy Tate, for the defendant.

Judgment was delivered on the following day.

MACMAHON, J.—Prior to the amendment of the Witnesses and Evidence Act in 1882, R. S. O. (1887) ch. 61, sec. 7, parties to a suit instituted in consequence of adultery, and the husbands and wives of the parties, were not even competent witnesses: R. S. O. (1877) ch. 61, secs. 4 and 7. The amendment made in 1882 (45 Vict. ch. 10, sec. 4), as will be seen, merely rendered such persons competent but not compellable witnesses.

By the Witnesses and Evidence Act, R. S. O. (1887) ch. 61, sec. 4, the parties to the action and the husbands and wives of the parties are competent and compellable witnesses on behalf of any of the parties to the proceeding, except in certain cases thereafter excepted. One of the exceptions is that created by sec. 7, which provides that: "The parties to a proceeding instituted in consequence of adultery, and the husbands and wives of such

parties, shall be competent to give evidence in the proceeding: Provided that in such case the husband or wife, if competent only under and by virtue of this Act, shall not be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery, unless he or she shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

Under sec. 7 the parties and the husbands and wives of the parties are merely competent and not compellable witnesses, as they are under sec. 4.

Section 7 of our Act was taken from sec. 3 of the Imperial Act 32 & 33 Vict. ch. 68, although there is a slight difference in the wording of the two sections—the section of the English Act being broader and giving any witness, whether a party to the suit or not, who claims it, protection from answering any question tending to shew that he or she has been guilty of adultery.

In Roscoe's N. P. Evidence, 16th ed., p. 163, the author, in discussing the section of the English Act, says: "It will be observed that sec. 3 enables a person when called as a witness in such a cause, whether a party thereto or not, to refrain altogether from giving any evidence that may tend to shew that he or she has been guilty of adultery; but the section does not exclude the evidence of the witness if he be willing to give it: *Hebblethwaite v. Hebblethwaite*, L. R. 2 P. & M. 29. The exemption extends to adultery of the witness committed at any time, and is not confined to the adultery in respect of which the proceedings were instituted: *Babbage v. Babbage*, *ib.* 222." See also Taylor on Evidence, sec. 1355.

The defendant was not compelled to give evidence in the proceeding, and the motion must be dismissed with costs.

TAYLOR V. NEIL.

Discovery—Examination of Party—Criminal Conversation—Alienation of Affections—R. S. O. ch. 61, sec. 7.

In an action for criminal conversation the defendant cannot be compelled to attend on examination for discovery.

Mulholland v. Misener, ante p. 132, followed.

But where in the action damages are also claimed for the alienation of the affections and loss of the society of the plaintiff's wife, the defendant can be examined upon that branch of the case.

Construction of sec. 7 of R. S. O. ch. 61, and difference between it and sec. 3 of the Imperial Act 32 & 33 Vict. ch. 68 pointed out.

[March 16, 1896.—*Boyd, C.*]

MOTION by the plaintiff to compel the defendant to attend at his own expense for examination for discovery in an action for criminal conversation with the plaintiff's wife, and for the alienation of the affections and loss of the society of the plaintiff's wife.

The motion was argued before *BOYD, C.*, at London, on the 13th March, 1896.

P. McPhillips, for the plaintiff.

T. G. Meredith, for the defendant.

Judgment was delivered on the 16th March, 1896.

BOYD, C.—The original of R. S. O. ch. 61, sec. 7, is the Imperial Act 32 & 33 Vict. ch. 68, sec. 3, whereby parties to proceedings instituted in consequence of adultery are competent witnesses "provided that no witness * * whether party to the suit or not, shall be liable to be asked * * any question * * as to the witness being guilty of adultery." In the Ontario statute this proviso is limited to the husband and wife of the party to the proceedings. The result would be that in England any witness who tendered himself or herself for examination would be protected from answering as to acts of personal adultery, but in Ontario that protection would extend only to the husband and wife of the party to the action. That distinction, however, is one which does not

aid the plaintiff in the present application for discovery by oral examination, so far as this action is for criminal conversation between the defendant and the plaintiff's wife. The first part of sec. 7 renders the defendant in such a case merely a competent but not a compellable witness. He may submit to be examined for discovery as to this part of the present action, or he may tender himself as a witness at the trial, and might, in that event, be questioned as to acts of adultery: but it is not in the power of the plaintiff to enforce the attendance or examination of the defendant as a witness or for discovery when the proceeding is one instituted in consequence of adultery. This is the point decided by my brother MacMahon, in *Mulholland v. Misener*, ante p. 132, and I see no reason to disagree with that authority.

Here, however, the action is of a compound character, and raises a distinct claim for damages on account of the alienation of the affections and loss of the society of the plaintiff's wife. The defendant has pleaded various matters of defence as to this cause of action, and there is no protection or privilege extended to defendants charged with this offence which shields them from compulsory examination. So far as this cause of action is concerned, the defendant must attend for examination at his own expense, and the costs of this application should be to the plaintiff in the cause in any event. In *Mulholland v. Misener* the statement of claim was founded entirely on the debauchment of the plaintiff's wife, whereby he was deprived of her society. Here there were two distinct causes of action, in one of which the plaintiff may succeed without proof of any act of guilty intimacy on the part of the defendant: *Metcalf v. Roberts*, 23 O. R. 130, 134.

RE ROSE.

Dower—Sum in Gross—Devolution of Estates Act—Creditors.

Under the Devolution of Estates Act, land of an intestate was sold by the administrator, with the approval of the official guardian, and, by consent of the widow, freed from her dower, upon the footing that she was to get out of the proceeds of the sale a sum in gross in lieu of dower. The estate was practically insolvent, and but little was left for the sustenance of the widow and children :—

Held, that, notwithstanding the opposition of creditors, the widow should be allowed a gross sum.

[March 21, 1896.—*Boyd, C.*]

MOTION by the official guardian, under Rule 1006, in a matter arising upon a sale of land by an administrator under the Devolution of Estates Act, for a direction as to the allowance to the widow of the intestate of a sum in gross in lieu of her dower.

The motion was argued before BOYD, C., in Chambers, on the 20th March, 1896.

J. Hoskin, Q.C., official guardian.

J. H. Moss, for the widow.

T. W. Howard, for J. G. McKeggie, the largest creditor, opposed the allowance.

Judgment was delivered on the following day.

BOYD, C.—Under the Devolution of Estates Act, land of deceased was sold, with the approval of the official guardian, and, by consent of the widow, freed from her dower. The sale was had by the administrator, and the usual experience in such cases, that a great appreciation in price results when the sale is free from the claim of dower. It is almost an invariable practice to sell the entire of the estate for this reason, and then deal with the widow in respect of dower afterwards. Now the widow's consent in this case was upon the footing that she was to get a sum in gross, and this is an eminently reasonable thing, because the estate is practically insolvent, and but little will be left

for the sustenance of the widow and children. Whatever might be the proper course in the case of a large estate, where the family was left amply provided for, I think the better practice is, in cases like this, to prefer the claim of the widow to a gross sum to that of creditors to have only annual payments on a funded capital—the residue of which shall be distributed on the widow's death. So I rule in the present case that the widow may have allowed a proper sum in gross in respect of dower. Costs to widow out of the fund.

RE ROBINSON, A SOLICITOR.

Solicitor—Taxation of Bill—Appeal—Rules 848-851, 1226 (d), 1230, 1231.

Upon an appeal by the solicitor from the decision of the Queen's Bench Division, 16 P. R. 423, rendered on appeal from the taxation of his bill of costs against his client, under the common order for taxation, the Court was divided in opinion as to one of the grounds of appeal, viz., that the appeal was not properly before the Court below :—

Held, per HAGARTY, C.J.O., that whether the appeal was or was not regularly before the Court below, it had jurisdiction to interfere to prevent a gross abuse. *Storer v. Johnson*, 15 App. Cas. 203, followed.

Per OSLER, J.A., that where what is sought by the appeal is the review of certain items of a solicitor's bill of costs against his client, the appeal is as from a Master's report under Rules 848-850; and this is the effect of Rule 1226 (d).

Per BURTON and MACLENNAN, JJ.A., that such an appeal is regulated by the same Rules and practice as apply to an appeal from a taxation of costs between party and party; and the provisions of Rules 1230 and 1231 not having been complied with, an appeal could not be taken under Rule 851.

[March 10, 1896.—*The Court of Appeal*.]

AN appeal by the solicitor from the order and decision of the Queen's Bench Division, 16 P. R. 423, upon appeal from the taxation of the solicitor's costs of a certain action of *Ramsey v. McLean et al.*, at the instance of his client, a defendant in that action.

The appeal to this Court was upon the ground, *inter alia*, that the case was not properly before the Court below, because no objections were carried in before the taxing officer, as provided by Rule 1230, and the appeal, if one

lay, should have been taken to a Judge in Chambers under Rule 851, and the appeal, if one lay, was not in time.

The report of the taxing officer was dated the 28th June, 1894, and the notice of appeal therefrom was served on the 8th August, 1894, returnable before the High Court on the 4th September, 1894. On that day ARMOUR, C. J., sitting in Court, made an order referring the taxation of the bill to Mr. M. B. Jackson to reconsider and review the same and to report thereon to ARMOUR, C. J. Mr. Jackson made a lengthy report, upon consideration of which ARMOUR, C. J., directed that the appeal should stand over and be argued before himself and the other Judges of the Queen's Bench Division; and after argument the order now appealed against was made by the three Judges, considerably reducing the amount of the bill.

The appeal was argued before HAGARTY, C. J. O., and BURTON, OSLER, and MACLENNAN, JJ. A., on the 20th November, 1895.

Tremear, for the appellant.

W. E. Middleton, for the respondent.

Upon the question whether the appeal was properly before the Court below, the following cases were referred to: *Snowden v. Huntington*, 12 P. R. 1; *Cameron v. Cameron*, 9 C. L. T. Occ. N. 196; *Hester v. Hester*, 34 Ch. D. 607; *Shrapnel v. Laing*, 20 Q. B. D. 334; *Re Crothers*, 15 P. R. 92; *Ford v. Mason*, 16 P. R. 25; in addition to other cases cited in the judgments.

Judgment was delivered on the 10th March, 1896.

HAGARTY, C. J. O.—A difficulty pressed on us here is that the respondents did not obey Rule 1230 by delivering written objections to the party and to the taxing Master before granting his certificate, specifying the items objected to.

Agreeing, as I fully do, with the view taken by the Divisional Court as to the extravagant amount of expenses

incurred in the suit, we still have to consider the formal objection.

I am most reluctant to interfere with the judgment of the Division in a matter affecting one of its own officers in his conduct of a suit.

Where the principle of a taxation is involved, and not the mere amount of particular items, the Rule does not seem to be applicable: *Sparrow v. Hill*, 7 Q. B. D. 362.

In *Storer v. Johnson*, 15 App. Cas. 203, Lord Chancellor Halsbury says at p. 206: "I think it is quite clear that the Solicitors Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might therefore order that the costs should be taxed, although not in terms of the Solicitors Act, and they might have selected one particular portion of the bill of costs to be taxed. The moment it was taken out of the region of the Solicitors Act and brought within the general jurisdiction of the Court, then the Court could exercise its own jurisdiction in the way it might think fit; and I am of opinion that the Court rightly exercised its jurisdiction so far as it was advised of what were the real facts."

The appeal was as to the right of the Court of Appeal to direct only a part of the bill to be taxed, and not the bill generally, as provided in the Solicitors Act.

Lord Watson said at p. 207: "I do not think that your Lordships are precluded, in a matter like this, from exercising the power which belongs to the Court, apart from the terms of the statute."

I think the case before us falls within the general principle here laid down.

I think that the Queen's Bench Division was not prevented by the existence of this Rule from reviewing the proceedings in this case. It is not an interference with a taxation in the ordinary sense, but an interference to prevent a grave abuse.

The case discloses a most startling accumulation of costs, to nearly \$2,000, in a suit for redemption of a farm of about 100 acres, not involving any very serious questions of law.

The appellant here acted for the defence; his costs were reduced on taxation to \$762. By the order of the Divisional Court this amount was largely reduced.

A very large portion of the cost was incurred on a reference to the Master, which was allowed to last for 137 hours. It is difficult to see how the counsel concerned (to say nothing of the Master), could have allowed such an unconscionable consumption of time and expense.

The Court expressed its regret that the plaintiff's bill of costs, some \$1,150, was not before them for review. We cannot adjust the blame attachable to this heaping up of costs between the parties; it may be quite possible that a lesser burden of blame may attach to the appellant. He is the only party before the Court, but I think, where a great abuse like this is brought to the notice of the Court, it has to be dealt with so far as justice requires, and the Court must deal with the legal charges of the side before them, although the opposite party, possibly more to blame of the two, has escaped their censure.

It is certainly time for the law to interfere to prevent such a startling abuse as is here under review.

I decline interfering with the decision appealed from.

BURTON, J. A.—I am informed by the taxing officer, to whom I applied in consequence of the statement in the reasons of appeal that the solicitor "from the procedure adopted has not been permitted to give his evidence, and that of his witnesses," that there was no refusal on his part to receive any evidence offered on his behalf, as I felt convinced must be the case with so careful and experienced an officer, but I shall refer more in detail to that after I have stated the proceedings which actually took place in his office.

He tells me that the practice in the taxation of costs as laid down by the present learned Chancellor when Master in *Re A. B., a Solicitor*, 8 C. L. J. N. S. 21, has been followed ever since.

The rule there laid down was this:—When a bill of costs

is brought in for taxation, it will be proper first to ascertain the matters which the client disputes in the bill, and for this purpose that he be directed to file and serve a notice containing his objections. If the objections are merely to the rate of charge, which can be disposed of as the account is gone through with, and vouched item by item by the taxing officer, then that stage of the proceedings may be at once entered upon, and the bill moderated and taxed as in ordinary cases. But if the objections dispute the retainer, or set up conduct in the solicitor "which may disentitle him to the whole bill, or to any group of items, or to any particular proceeding severable from the rest of the bill, * * these objections should first be dealt with, evidence given thereupon, and the ruling of the Master had, before the item by item work is commenced."

In the present case the usual practice was adopted and the client filed the following objections, viz. :—

"DATED THE 26TH APRIL, A. D. 1894.

1. Client objects that the solicitor is not entitled to any of the costs in the action of *Ramsey v. McLean*, for the reason that she was desirous to settle the said action and that she so instructed the said solicitor to settle the said action, but he wilfully proceeded with the said action without making any attempt to settle the same and wholly against the will of his said client.

2. The said client objects that no costs of the appeal from the report of the local Master in the said action of *Ramsey v. McLean* should be allowed to the said solicitor for the reason that the said client did not instruct her said solicitor to take such appeal, and was not aware that such appeal had been taken, and the same was taken by the said solicitor of his own accord and against the will of the said client.

3. The said client objects that the reference in the said action of *Ramsey v. McLean* was improperly conducted by her said solicitor, and thereby the said reference was con-

tinued for a much greater length of time than it should have been.

4. The said client says that she is entitled to credit for the sum of \$103.50 cash paid to the said solicitor in payment of her note to J. Mulligan with which she is charged.

5. The said client objects to the item for costs charged as a disbursement to Mr. Jell of \$70, and says that she did not employ Mr. Jell or authorize her said solicitor to incur the said costs."

Evidence was then gone into, and the objections were overruled upon the client's own evidence, which the Master speaks of as being very unsatisfactory, and although he says he is always very careful to avoid any expression of opinion, the solicitor was quite justified in the conclusion he arrived at, that the objections would be overruled without his offering evidence. It might, perhaps, have been better had he done so; but it would have further lengthened this protracted inquiry, and the Master states that, whoever was guilty of the unconscionable length of this inquiry, this solicitor was not the party.

It may be said that this information is not before us, but as, in the view I take of the proceedings in this case, involving the question of whether the absence of the filing of the objections was a matter of substance or a mere formality, and whether the appeal was or was not in time—which it was not if it should have been taken under Rule 851—I have thought it better to seek the information, which may have an important bearing on the first point, which the Divisional Court has not dealt with, viz., the right to appeal at all in such a case as the present from the taxing officer's finding, in the absence of an objection in writing to the allowance or disallowance of the items objected to, thus depriving that officer of an opportunity further to consider and review his taxation, upon which occasion he can receive further evidence.

It is not pretended that any such objections were filed in this case. If, therefore, this case is to be considered as coming within Rules 1230 and 1231, the items not having

been objected to as therein provided, no appeal lies under Rule 851, and the certificate has become final and conclusive as to all matters which have not been so objected to.

The notice of motion shews that certain items only were objected to, so that, as decided in *Sparrow v. Hill*, 7 Q. B. D. 362, these items cannot now be inquired into, the client having omitted to draw the attention of the taxing officer to them; and it is to be remarked that if the case is within these Rules, the motion should have been made to a Judge in Chambers and not to the Court; within four days, and not fourteen days, as in the case of an appeal from a Master's report.

It is said that those Rules do not apply to a taxation between solicitor and client; but I do not see why they should be so restricted. The words are as general as they can possibly be, and a very strong case should be shewn for construing them in that way. The difficulty suggested arose from the introduction into Rule 1226 of sub-sec. (*d*), which provides that the amount certified to be due shall be paid forthwith after the confirmation of the certificate by filing, as in the case of a Master's report, by the party liable to pay such amount.

In other words, when it is intended to take further summary proceedings, which can now be done instead of bringing an action, as was formerly necessary in the Common Law Courts, we have adopted the equity practice which in England orders the amount found to be due to be paid within a certain defined time. I think, although not in the same words, that is all that is meant in our Order--giving the same time as is allowed in the case of the confirmation of a Master's report, instead of twenty-one days from the service of the certificate, as in England, and not that all the incidents respecting a Master's report and an appeal therefrom are to apply.

These matters are dealt with separately in the Rules.

1. We have Rules dealing with appeals to the Court of Appeal.

2. High Court and County Court Appeals.
3. Appeals from Chambers.
4. Appeals from Masters and Referees.
5. Appeals from taxation.

In this latter class is included Rule 851, which gives an appeal as to any item or part of an item which has been objected to under Rules 1230 and 1231, and that appeal is to a Judge in Chambers; so that, if the objections had been filed, there could be no question that that would have been the proper course. Can the client be in a better position by omitting to comply with the Rule?

Here the motion was made to the Court and the order made by the Court, and not to a Judge in Chambers, with a further appeal to the full Court.

Now, with all deference, it seems to me that the only appeal from a taxing officer's certificate is that authorized by Rule 851. It is, of course, settled law that there is no appeal in any case unless expressly authorized by statute, and that this Rule must be read, as a similar Rule in England has been interpreted, as meaning that where items are objected to, the exceptions must be filed, but that in all cases where the question is whether the officer has proceeded on a correct principle, the appeal will still be heard under that Rule, although in such a case it is not necessary to draw the attention of the officer to specific objections. That was the practice before the change made by *Exchange Bank v. Newell*, 9 P. R. 528, where it was held that the General Orders as to appeals on a Master's report were applicable to a taxing officer's certificate, or rather, I should say, following a decision in *Re Ponton*, 15 Gr. 355, in 1868, long before the recent Rules.

With these decisions before them, I think different language would have been used in sub-Rule (d) if the framers had intended that a taxing officer's certificate should be treated in all respects as a Master's report with all its incidents. On the contrary, the spirit of the Rules in reference to taxation seem to indicate that a short, speedy, and inexpensive disposal should be made of all dis-

puted questions, giving the taxing officer full opportunity in the first place to review his decision.

But if I am wrong in this, why may not Rules 848 and 851 stand together, the first applying to all questions of the principle of the taxation or the misconduct of parties, etc., and the latter to disputed items.

That is not my view of the law. I think the appeal, and the only appeal authorized, is under 851, and that it applies to all cases.

In the present case the only appeal is as to particular items, and Rule 851 applies in express terms to such a case.

I do not consider the omission to file objections as by any means a technical matter, as it seems to have been treated in the Divisional Court.

There are several items in the account—for instance, the holding the meeting at Rodney and the expenses connected therewith—which could not properly be allowed unless shewn to be at the request or with the consent of the client with full knowledge; but that we must now assume was proved to, the satisfaction of the taxing officer; had it been objected to, the solicitor would have had an opportunity of shewing by the evidence of himself and his witnesses that the charge was justified.

If, therefore, the objections had been duly filed, the only questions before the Court would have been as to the quantum of the charges on the particular items mentioned in the notice of motion.

Now nothing is, I think, more clearly settled than that the decision of the taxing officer as to items placed by the tariff in his discretion will not be reviewed, and in the same way as to the amount of counsel fees, which will not be interfered with unless a gross mistake is made.

I do not at all doubt the right of the Court, in the exercise of its general jurisdiction, to interfere to prevent abuses; but in all such cases, where the decision is to affect an officer of the Court, the amplest opportunity is given him to be heard. This is an appeal involving the

construction of a Rule of Court, where no such question was likely to arise, and where no misconduct of the attorney is alleged, and he has been given no such opportunity.

I share the indignation of the Judges in the Court below at the scandalous state of things disclosed in this case, and think, with the clerk of the Crown and Pleas, that the fault is attributable to a great extent to the system. I am of opinion that the payment of persons performing judicial functions by fees is utterly vicious and leads to enormous abuses, of which this is only an instance.

Who is responsible in this case for the reckless waste of time and money in the investigation of the matters in dispute, I do not know, and I hesitate attaching blame to any one who has not an opportunity of being heard; but there has been a flagrant departure from the rule which requires a reference of this nature to proceed *de die in diem*, and the enormous length of time consumed appears to me to furnish a reason why the Attorney-General should call upon the Master for an explanation.

But the Courts having adopted a rule, and a wise one in my opinion, not to interfere with the discretion of the taxing officer in a matter of quantum, a consideration of the whole question calls urgently for action; but this particular solicitor, in the absence of evidence, which we have not, of misconduct, should not be made the victim, practically without being heard. I think, therefore, it is a case in which the want of filing objections is very properly invoked, and that it would have been our duty to give effect to it; but in the view I take of the Rules, the notice of appeal was too late and the proceedings *coram non judice*, and I am of opinion, therefore, that the appeal should be allowed.

OSLER, J. A.—The only question is whether the appeal to the Court below was brought in a proper manner in accordance with the Rules and practice. What was desired by the appeal was the review of certain items of the solicitor's bill of costs against his client, and the point in

dispute is whether the appeal should have been by way of review under Rules 851-854, depending upon a strict compliance with Rules 1230 and 1231, or by way of appeal as from a Master's report under Rules 848-850.

Under the Rules of the Judicature Act, 1881, the taxation of a solicitor's bill against his client was reviewed precisely in the same way as the taxation of a bill between party and party. If either party desired a review, he must have carried in his objections before the taxing officer, as required by Rule 447, specifying the items objected to, so that the officer's attention might be specially drawn to what was in dispute before he issued his final certificate. If these objections were overruled, then, upon the issue of the certificate, the dissatisfied party might appeal to a Judge in Chambers for an order to review the taxation under Rule 449, which also provided that the certificate of the taxing officer should be final and conclusive as to all matters which should not have been objected to in manner aforesaid, *i.e.*, as required by Rule 447. These Rules are Rules of General Order L., "costs and their taxation," and undoubtedly applied, as the corresponding Rules in the English practice have always been held to do, to both modes of taxation : see, *e. g.*, *Re Castle*, 36 Ch. D. 194; *Hester v. Hester*, 34 Ch. D. 607; and a review of taxation was not granted if the provisions of Rule 449 as to carrying in objections had not been complied with, unless the whole bill was objected to or the general principle of the taxation was challenged : *Sparrow v. Hill*, 7 Q. B. D. 362; *Hester v. Hester*, 34 Ch. D. at p. 616.

Before the passage of the Judicature Act, 1881, the Master's certificate of taxation of a bill between attorney and client was in the Court of Chancery treated as a report of that class, an appeal from which was properly taken, even as to taxation of items, to the Court and not to a Judge in Chambers : *Re Ponton*, 15 Gr. 355; but after that Act and the Rules came into force, there was no excuse or justification for adhering to that practice, although that is what seems to have been done. When,

however, the Rules were consolidated in 1887, those who framed and recast them introduced into the Rule (No. 443), which declared what terms should be implied in or read into the order for the delivery and taxation of a solicitor's bill of costs, a new clause (*d*), which provides that the amount certified to be due shall be paid forthwith after confirmation of the certificate by filing, as in this case of a Master's report, by the party liable to pay such amount. This is now clause (*d*) of the Con. Rule 1226. In other respects the Con. Rules, so far as regards the matters in question, remain as before, save that Rule 449 is now found in another place as Rule 851, under the heading "appeals from taxation," referring expressly to Rules 1230 and 1231, which correspond to the former Rules 447, 448, and which occupy the same position with regard to the other Rules on the subject of taxation as they did before. The contention of the respondent is that the effect of the new clause (*d*) is to wholly do away with the practice of reviewing the taxation of a solicitor's bill of costs under Con. Rules 1230, 1231, and 851, by appeal to a Judge in Chambers in four days from the date of the certificate, on compliance with the requirements of the two former Rules, and to make an appeal to the Court within fourteen days after filing the certificate, pursuant to Rules 848-850, the proper method of challenging the report or certificate as well as regards items of the bill as other subjects it may have dealt with.

If this contention is well founded, the appeal to the Court in the present case was right, although it does not appear that the certificate was ever in fact filed; but if not, the respondent's proceedings were irregular, because no objections to the taxation were carried in by her before the taxing officer, and therefore the foundation of the jurisdiction to interfere with the taxation (being a taxation of items only, the objections now raised not going to the whole principle of the taxation) would be altogether wanting.

The question therefore is what is the effect and proper construction of clause (d). Had it provided simply that the amount certified to be due should be paid at the expiration of fourteen days after the filing of the certificate, no difficulty could have arisen. But the language is, "shall be paid forthwith after confirmation of the certificate by filing, as in the case of a Master's report." We are, therefore, obliged to see what is meant by confirmation, as the time for payment cannot be otherwise ascertained, and are thus thrown back upon Rule 848, under "Appeals from Masters and Referees—" "Every report shall become absolute (*i.e.*, confirmed) at the expiration of fourteen days from the day of filing the same * * unless notice of appeal is served within that time." If notice of appeal is served, it prevents the report from becoming absolute—from being confirmed—until the appeal is disposed of.

The very term "confirmation" implies that some proceeding is open to the party affected by the certificate, by which he may prevent it from becoming effective, and the right of appeal from the certificate is, in my opinion, conferred by clause (d) and Rule 848, which is drawn into it by reference. It cannot have been contemplated that there should be two appeals from the certificates—one from the taxation of items of costs, to be taken in four days after the date of the certificate; and one, to be brought within fourteen days of the filing of it, confined to any other questions which might have arisen on the taxation, such as the question of account, which in England are all dealt with on the review of taxation: *Re Scott and Baker*, 33 Sol. J. 270.

I think it was intended to withdraw a report or certificate on a solicitor and client taxation from the operation of the Rule as to other taxations, and, possibly for very good reasons, to revert to the earlier practice in that respect; because the questions which arise on the former are frequently of a larger and more important nature than on the latter. The argument drawn from the grouping under different heads of different classes of appeals loses much, if not all,

of its force, when you are dealing with language which itself denotes the particular class within which the appeal given by it comes.

Upon the best consideration I have been able to give to the matter, I am unable to agree that clause (d) can be regarded as simply fixing an arbitrary time for unconditional payment. That is not the meaning of the language, nor is it capable of that construction. It is very different from the provision found in the English order for taxation: Seton on Decrees, 4th ed., pp. 605, 606. The construction I have placed upon clause (d) is that which has been placed upon it in at least two reported cases: *Re Crothers*, 15 P. R. 92; *Ford v. Mason*, 16 P. R. 25; and, in my opinion, it is the right one, though I should not have been sorry had I been able to take a different view.

Whether the Court, in the exercise of its general jurisdiction, could or ought to have made the order now complained of, had the appeal to it been, on this particular ground, incompetent, I do not determine. The case was not so presented to that Court, nor to us; if it had, it might have involved other considerations; and I feel that the safer ground to rest upon is that the proceedings were regular.

On the merits of the case, it is impossible to interfere with the decision. I should, myself, have been satisfied to act upon the excellent report of the learned Registrar of the Common Pleas Division, but in going beyond it, I cannot say that the judgment appealed from is wrong.

MACLENNAN, J. A.—This appeal raises a somewhat difficult question of the construction of the Rules of Court. On the 21st March, 1894, an order was obtained by the respondent for the taxation of the costs of the appellant, her solicitor in a protracted litigation, and the order is in the usual form. On the taxation certain formal objections in writing were filed, and a certificate was made finding a balance due from the client of \$141.98. That certificate was dated the 2nd June, 1894, and on the 4th September afterwards a motion was made before Mr. Chief Justice Armour, upon

notice served on the 8th August, by way of appeal therefrom, on other grounds than those specified in the objections filed before the taxing officer, and that appeal was allowed: 16 P. R. 423. The solicitor then appealed to this Court, and one of his grounds of appeal was that no objections were carried in before the taxing officer, as provided by Rule 1230; and that no appeal lay from the certificate; and that, at all events, the appeal should have been to a Judge in Chambers under Rule 851; and that it was brought too late under Rule 852. To this it was answered that Rules 1230 and 1231 were inapplicable to a solicitor and client taxation such as this; that Rule 851 and following Rules were also inapplicable; and that such a taxation as this was governed by Rules 1226, 1227, 1228, and 1229, and Rules 848, 849, and 850; and that is the important question which we have to decide. This argument of the respondent is plausible, and I was at first much impressed by it; but upon consideration I think it cannot prevail. Before the Judicature Act in the Common Law Courts an appeal from a taxation was to a Judge in Chambers, and that was so whether it was a party and party or solicitor and client taxation. In the Court of Chancery it was settled that a certificate of taxation was a report, and was appealable in the same way as other reports: *Re Ponton*, 15 Gr. 355. The Judicature Act, while by Rule 3 retaining many of the existing Chancery Orders, including Order 642, providing for appeals on a seven day notice, "from any decree, order, report, ruling, or other determination of any Master," enacted a wholly new series of provisions in relation to costs, by Rules 428 to 450 inclusive, otherwise designated as Order L., Rules 1 to 23 inclusive.

By Rule 439 four of the existing Chancery Rules are retained, and with these additions, those 23 new Rules formed what may be termed a code on the subject of costs. Some of these Rules were taken from the English Judicature Act, but several others were new. Rule 443, the original of the present Rule 1226, with its sub-sections, was new, while Rules 447, 448, 449, and 450, corresponding with the

present Rules 1230, 1231, 851, and 853, were taken from the English Act. Now, if these Rules are looked at as they stood in the Judicature Act of 1881, it is quite apparent that Rules 447, 448, and 449 must be held applicable to all taxations, whether party and party or solicitor and client, that is, where the taxation is by one of the taxing officers provided for by Rule 438. That appears to me to be so clear that really nothing can be suggested to the contrary. No change was made in the Rules thus enacted by the Judicature Act for seven years, nor until the passing of the Consolidated Rules on the 1st September, 1888. In the consolidation, Rule 443 of the Judicature Act was recast into its present form, Rule 1226, and a new classification was introduced, whereby Rules 449 and 450 were removed from the code as to costs, and placed among the Rules relating to appeals. The principal change made in Rule 443, now 1226, was the introduction of the present sub-section (d), which reads: "The amount certified to be due shall be paid forthwith after confirmation of the certificate by filing, as in the case of a Master's report, by the party liable to pay such amount." It is said that the introduction of this clause has changed the mode of appealing from a solicitor and client taxation, and has put it on the same footing as an appeal from an ordinary report of a Master, which is regulated by Rules 848, 849, 850. I think it is impossible to give such an extensive effect to this clause. It merely limits a time for payment. When it is confirmed by filing, as in case of a report, the amount is to be paid. No doubt we must refer to Rule 848 for the time which is to elapse after filing, but the time for notice of appeal is still governed by Rule 852, and not by Rule 849. Until sub-section (d) was introduced into Order 1226, there was no provision by Rule for the time of payment of the sum found due upon a solicitor and client taxation; and that had to be inserted in the order for taxation. The sole object and purpose, therefore, as I think, of inserting that sub-section in the Rule was to save the necessity of providing for it in the order, and not for the purpose of

making any change in the manner of appealing. If it were otherwise, the anomaly would result of there being one mode of appealing on solicitor and client taxations, and another in cases of taxation between party and party.

Many cases shew that in England, ever since the Judicature Act, all taxations, whether party and party or solicitor and client, and appeals therefrom, have proceeded under the Rules which correspond with our Rules 1230, 1231, and 851. I am, therefore, of opinion that the objections to the appeal raised by the respondent in the Court below were well founded, and that the appeal was wrongly brought and ought to have been dismissed.

The present appeal, therefore, ought to be allowed, and the order of the Divisional Court should be discharged.

MOLSONS BANK V. COOPER ET AL.

Appeal Bond—Condition—Affidavit of Execution—Affidavit of Justification.

The condition of a bond filed by the defendants as security for the costs of an appeal to the Supreme Court of Canada was that if the defendants “shall effectually prosecute their said appeal and pay such costs and damages as may be awarded against them by the Supreme Court of Canada, then this obligation shall be void; otherwise to remain in full force and effect:”—

Held, that the bond was not irregular.

2. The affidavit of execution of such a bond need not be entitled in the cause.
3. A surety in such a bond, when justifying in the sum sworn to “over and above what will pay all my just debts,” need not add “and every other sum for which I am now bail.”

[March 17, 1896.—Osler, J.A.]

MOTION by the defendants Cooper and Smith and John C. Smith for the allowance of their appeal to the Supreme Court of Canada from the judgment of the Court of Appeal.

The condition of the bond filed by the intending appellants was that “if the said Cooper and Smith and John

C. Smith shall effectually prosecute their said appeal and pay such costs and damages as may be awarded against them by the Supreme Court of Canada, then this obligation shall be void ; otherwise to remain in full force and effect."

The motion was argued before OSLER, J. A., in Chambers, on the 17th March, 1896.

J. S. Denison, for the applicants.

W. E. Middleton, for the plaintiffs, raised the several objections mentioned in the judgment.

Judgment was delivered on the same day.

OSLER, J. A.—I think the bond proposed for security for costs in the defendants' appeal to the Supreme Court, is not irregular. The condition is more favourable to the respondents than it need be, for whether the appellants prosecute their appeal with effect or not, it purports to bind them to pay. If they fail, they must pay under the condition ; if they succeed, they will have to ask the Court to give it a liberal construction in their favour, and to argue that "and" means "or," as, by anticipation, I may say there can be no doubt it does.

Then as to the affidavit of execution, the point taken is that it is not entitled in the cause. I do not think that is necessary. It might as well be urged that the bond should be so entitled. All that is wanted is an affidavit or affirmation proving the execution of an instrument as a fact. I have taken the trouble to look at a large number of these bonds on the files of the Court. In some cases the affidavits are entitled in the cause—the majority no doubt—but in many others it is not so.

The affidavits of justification are also objected to because the defendants, besides justifying in the sum sworn to, "over and above what will pay all my just debts," do not add "and every other sum for which I am now bail." There is no Rule of Court which requires this in the

case of these bonds ; and, as in the case of the affidavit of execution, I have looked at the bonds now on file as to the affidavits in question. I have not found one instance in which the affidavits contain this clause. For many years the form adopted in the case before me has been followed, and I think I ought not to require anything more. Of course, if the respondents are not satisfied, they can cross-examine the sureties, but I shall hold the affidavits to be *prima facie* sufficient.

Mr. Middleton tells me that on some former motion which he had before me, I expressed the opinion that the affidavits should be as full as affidavits justifying bail, though he concedes that I did not disallow the bond then in question. Very likely I may have so expressed myself, as he says so. I have no note of the case. But having looked into the matter, I am quite satisfied that the practice is not so inflexibly established that I ought to hold the bond now in question insufficient. It must, therefore, be allowed, unless further time is wanted in order to cross-examine the sureties. If necessary, the appellants must be in the same position as regards their journey to the Supreme Court as they were when the motion was first returnable.

I may refer generally as to these appeal bonds to my judgment in *Robinson v. Harris*, 14 P. R. 373.

ONTARIO FORGE AND BOLT CO. v. COMET CYCLE CO.

Costs—Company—Liquidator—R. S. C. ch. 129, sec. 31 (a)—Claim and Counterclaim.

Where an action is brought by the liquidator of a company in liquidation, in the name of the company, and he is not otherwise a party to it, he cannot be ordered personally to pay the costs of it.

Where the plaintiff succeeds upon his claim, and the defendant upon his counterclaim, the former should receive the costs of the action, and the latter those of the counterclaim.

Judgment of ROSE, J., varied.

[March 10, 1896.—*The Court of Appeal.*]

AN appeal by the plaintiffs and E. R. C. Clarkson, liquidator, from the judgment of ROSE, J., at the trial of the action and counterclaim.

At and before the time the action was brought the plaintiffs' company was in process of winding-up under the Dominion Winding-up Act, R. S. C. ch. 129, and E. R. C. Clarkson was the liquidator of the company.

The action was brought to recover \$542.85 for dies and forgings manufactured by the plaintiffs for the defendants, of which the forgings only had been delivered by the plaintiffs to the defendants.

The counterclaim was for \$600 paid by the defendants to the plaintiffs for dies which were never delivered to the defendants, and for \$500 damages for conversion and non-delivery of such dies.

ROSE, J., adjudged that the plaintiffs should recover \$256.91 upon their claim, and the defendants \$490.37 upon their counterclaim, with set-off *pro tanto*; and that Clarkson, the liquidator of the plaintiffs, should pay to the defendants their costs of the action and counterclaim; but was to be at liberty to make application for payment out of the assets of the plaintiffs of his own costs and the costs directed to be paid by him.

The appeal was upon the grounds: (1) that parol evidence was improperly admitted at the trial to vary the

written contract between the parties; (2) that there was no power to order the liquidator to pay the costs; and (3) that the plaintiffs were entitled to costs against the defendants of their claim, upon which they succeeded.

The question as to the admission of the evidence is not of importance except to the parties. The decision upon it was in favour of the defendants, affirming the judgment of ROSE, J.

The appeal was argued before HAGARTY, C.J.O., and BURTON, OSLER, and MACLENNAN, JJ.A., on the 5th, 7th, and 10th February, 1896.

Robinson, Q.C., and *John Greer*, for the plaintiffs and Clarkson, the appellants. The judgment is wrong as to costs. The liquidator acted with the authority of the Court. He is not a party to the record. It is not a case like *Re Bolt and Iron Co.—Hovenden's Case*, 10 P. R. 434, where the liquidator attempted to bring in a contributory, and, failing, was ordered to pay costs. Even if he were a party to the record, the liquidator should not have been ordered to pay costs personally; *In re Bolton and Co.*, [1895] 1 Ch. 333. At any rate, the plaintiffs were entitled to costs of their claim against the plaintiffs, and the defendants only to costs of their counterclaim: *Summerfeldt v. Johnston*, 17 P. R. 6.

E. B. Ryckman and *A. T. Kirkpatrick*, for the defendants. The judgment is right as to costs. The plaintiffs are responsible for the litigation. They made a demand for payment before giving up what was admittedly the defendants' property. The Judge, under Rule 1170, has full discretion over the costs. The counterclaim is really a defence or set-off, and more than extinguishes the plaintiffs' claim. Under these circumstances, the claim and counterclaim cannot be treated as separate and distinct: *McLean v. Goodman*, 6 Times L. R. 185; *Lowe v. Holme*, 10 Q. B. D. 286; *Baines v. Bromley*, 6 Q. B. D. 691; *Stooke v. Taylor*, 5 Q. B. D. 569; *Snow's Annual Practice*, 1896,

p. 466. The liquidator is the real plaintiff; he launches the action in the name of the company; and is liable to pay costs: *Healey's Law of Joint Stock Companies*, 3rd ed., p. 732; *Re Staffordshire Gas and Coke Co.*, [1893] 3 Ch. 523. The judgment gives the liquidator the right of indemnity, and there are sufficient assets for that purpose: *In re Dominion of Canada Plumbago Co.*, 27 Ch. D. 33; *In re Massey*, L. R. 9 Eq. 367; *In re Marseilles Extension R. W. Co.*, 30 Ch. D. 598. Under R. S. C. ch. 129, sec. 31, the liquidator has power to bring an action in his own name or the company's. Under the English Act the action must be in the company's name, and a defendant can obtain security. The liquidator, even if not a litigant, is an officer of the Court, and in that capacity could be ordered to pay costs: *Ferrao's Case*, L. R. 9 Ch. 355. *Fraser v. Brescia Steam Tramways Co.*, 56 L. T. N. S. 771, turns on the wording of the English Act. The liquidator can obtain indemnity before bringing an action. If the judgment is wrong, it should be amended by giving the costs out of the assets of the company: *Re London Metallurgical Co.*, [1895] 1 Ch. 758.

Robinson, in reply. The Judge had no jurisdiction to order Clarkson to pay the costs. He is not a party, and if he is really interested, and it is desired to make him responsible for costs, the practice indicated in *Gordon v. Armstrong*, 16 P. R. 432, should have been followed. The liquidator's position is considered in *Fraser v. Brescia Steam Tramways Co.*, 56 L. T. N. S. 771, and the distinction between his position and that of a trustee is pointed out. At any rate, the action is brought with the approval of the Court, and that in itself is sufficient to shew that this personal order is improper. There is nothing in the liquidator's conduct to justify such an implied disapproval.

Judgment was delivered on the 10th March, 1896.

BURTON, J.A.—The judgment for costs against the liquidator we thought upon the argument could not be

supported. No authority was cited for it, and I have been unable to find any. That portion of the judgment should therefore be reversed.

The counsel for the defendants asked, in the case of our decision being adverse to him on that point, that we should proceed to give the judgment as to costs which the learned Judge should have given; and this seems reasonable, and, there being nothing apparently to take the case out of the ordinary rule, I take the practice to be well established that where the claim and counterclaim are to be treated as independent actions, that is to say, where the counterclaim could not possibly be in the nature of a set-off, but an independent cause of action, the costs should be taxed to the plaintiff upon his claim as if it were a separate cause of action, and as to the counterclaim the costs of it should be taxed in the same way as if it were a separate action.

As the appellant has succeeded in part and failed in part, there should, I think, be no costs of this appeal.

OSLER, J.A. — Then as to the costs. The liquidator complains that he has been ordered personally to pay the defendants the whole costs of the defence and counterclaim. No doubt the action was instituted by the liquidator; it is his action, though brought in the name of the company, as authorized by the Winding-up Act, R. S. C. ch. 129, sec. 31 (a). It is not suggested that he has done anything improper, or that the plaintiffs are not able to pay the costs. He was not brought before the Court by any motion calling upon him to shew cause why a personal order should not be made against him; and I see nothing in any of the cases cited by Mr. Ryckman to support this part of the judgment. The liquidator is not a party to the record, and he is not before the Court. How, in such circumstances, can a personal order be made against him? I refer to *Fraser v. Brescia Steam Tramways Co.*, 56 L. T. N. S. 771, where the question is considered; and to *Re Cosmopolitan Life Association*, 15 P. R. 185. This direction as to costs being struck out, the costs below remain

undisposed of, as no order was made against the company, and we are now to direct what ought to be done in that respect. We interfere with no exercise of the learned Judge's discretion in saying that no reason appears why the usual rule should not prevail, where the plaintiff succeeds on the claim and the defendant on the counterclaim, viz., the former is to receive the costs of the action and the latter those of the counterclaim. There should be no costs of the appeal, nor any direction here as to set-off.

MACLENNAN, J.A.—The other branch of the appeal is as to the costs. The learned Judge ordered the liquidator, Mr. Clarkson, to pay the costs of the action, including the costs of the claim and counterclaim, personally, although he was not a party to the action. The Winding-up Act, R. S. C. ch. 129, sec. 31 (*a*), authorizes the liquidator to bring actions in the name and on behalf of the company, and the action is in the company's name, and there is no authority for making the liquidator pay the costs. In the course of the winding-up the liquidator may have to make various applications to the Court in his own name, and when he does so it is at the peril of costs; for there is no one else before the Court to answer them. But the case is entirely different when an action is brought in the name of the company. That part of the judgment is, therefore, wrong and must be corrected, and I see no reason why the ordinary rule as to costs in such cases should be departed from. The plaintiff should have the general costs of the action and the defendant the costs of the counterclaim, with mutual set-off of both judgments and costs.

HAGARTY, C.J.O., concurred.

FOX V. FOX.

Jury Notice—Striking Out—Discretion—Local Judge—Powers of—Equitable Issues.

A local Judge has jurisdiction, in an action brought in his own county, where the solicitors for all parties reside in such county, by virtue of sec. 185 (5) of the Judicature Act, 1895, to make an order under sec. 114 striking out a jury notice as a matter of discretion; and he may do so sitting in Chambers.

And where the issues raised in an action of ejectment were mainly equitable, and it appeared to be a case in which the Judge at the trial would dispense with the jury:—

Held, that the local Judge should have exercised his discretion and struck out the jury notice.

Seem, that where there are both legal and equitable issues on the record, in the absence of an order under sec. 114, a party has the right to have the legal issues tried by a jury.

Baldwin v. McGuire, 15 P. R. 305, commented on.

[March 27, 1896.—*Divisional Court.*]

AN appeal by the plaintiff from an order of one of the local Judges at Sandwich, in Chambers, dismissing a motion by the appellant to strike out the jury notice filed and served by the defendant in an action of ejectment.

The appeal was argued before a Divisional Court composed of MEREDITH, C. J., and ROSE and MACMAHON, JJ., on the 20th March, 1896.

F. A. Anglin, for the plaintiff, contended that the case was one within the exclusive jurisdiction of the Court of Chancery before the Administration of Justice Act, 1873, because an injunction was claimed by the plaintiff, and equitable issues were raised by the defendant; and therefore the jury notice was irregular; or, if not, that the local Judge had power to hear the motion under sec. 185 (5) of the Judicature Act, 1895, the action being brought and the solicitors for both parties residing in the county of Kent, and should have exercised his discretion by striking out the jury notice.

L. G. McCarthy, for the defendant, contended that the local Judge had no jurisdiction to strike out the jury notice except for irregularity; and that the action and

defence were of a common law character, and the notice therefore regular.

Judgment was delivered on the 27th March, 1896.

MEREDITH, C. J.—Appeal from an order of the local Judge at Sandwich dismissing a motion made by the plaintiff to strike out a jury notice filed by the defendant.

Unless the power to do so is conferred on the local Judge by sec. 185 of the Judicature Act, 1895 (58 Vict. ch. 12), it is clear that he has no jurisdiction to strike out a jury notice except for irregularity.

The Master in Chambers has no such power: see Con. Rule 1287, which replaced Con. Rule 30, the Rule in force when *Bristol and West of England Loan Co. v. Taylor*, 15 P. R. 310, was decided. By item (16) of the new Rule one of the excepted powers, *i.e.*, excepted from the jurisdiction of the Master, is:

(16) Striking out a jury notice except for irregularity.

And by Con. Rule 1386 the power as to the matters dealt with by Rule 1287 of the local Judge is similar to that of the Master in Chambers, but no greater or more extensive.

The effect of sub-sec. 5 of sec. 185 of the Judicature Act, 1895, is, however, greatly to extend the powers of the local Judge where, as in this case, the action is brought and the solicitors for all the parties reside in his county. He is in such cases given all the powers of a Judge of the High Court sitting in Court, except in certain cases where infants are concerned, to hear, determine, and dispose of motions for judgment, and all other motions, matters, and applications (not including trials of actions.)

Although it is usual that applications to a Judge to strike out a jury notice under sec. 114, when made before the trial, are made to him sitting in Chambers, he has of course power to deal with them in Court, and it must therefore be that the powers conferred by sub-sec. 5

include the power to hear, determine, and dispose of applications under sec. 114, and that being so, it can, I think, make no difference that the order is made by the local Judge in Chambers. If he has jurisdiction to deal with the matter, I do not see that there is anything to prevent him doing so as a Judge of the High Court would, sitting in Chambers.

Having regard, then, to the issues raised on the pleadings being mainly equitable, and the probability, indeed almost certainty, that any Judge before whom the action would come for trial would dispense with the jury, I think the local Judge should have exercised his discretion in favour of the plaintiff and have struck out the jury notice.

What I have said is sufficient for the disposal of the motion, and it is unnecessary to determine the question discussed on the argument as to the irregularity of the notice because of there being both legal and equitable issues on the record, though, as at present advised, but for the decision in *Baldwin v. McGuire*, 15 P. R. 305, it is difficult for me to see why, at all events with the present distribution of business at the sittings for the trial of actions, Rule 678 alone, or taken in connection with Rule 677 and sec. 110 of the Judicature Act, 1895, should be held to deprive a party of his right, in the absence of an order under sec. 114, to have the legal issues tried by a jury—a right which he apparently has under secs. 111 and 112.

As the point on which the appeal has been dealt with is somewhat new and of general importance, I think that the costs both here and below should be costs in the cause to the successful party, and the appeal will therefore be allowed and an order made striking out the jury notice, and the costs will be, as I have said, in the cause to the successful party.

ROSE, J.—I agree that the local Judge had jurisdiction under the provisions of sec. 185, and that, having regard to the issues raised, and for the reasons given by the

learned Chief Justice, and the additional reason that it was fairly open to argument that under *Baldwin v. McGuire*, 15 P. R. 305, there was no right to give a jury notice, the local Judge should have granted the motion.

I do not therefore find it necessary to consider or form any opinion upon the question as to the proper construction to be placed upon the statute and Rules as to the right to have a jury where the issues are both legal and equitable, if such question is open for consideration since the judgment in *Baldwin v. McGuire*.

Were it not that some of the matters which the local Judge is empowered to deal with by sub-sec. 5 of sec. 185 are matters which had been dealt with by a Judge of the High Court in Chambers and some are matters dealt with in Court, I should have thought that there was much in the argument that the jurisdiction conferred upon the local Judge in Chambers matters was by the Rules, and in Court matters by the statute, but I think, in view of what I have said, that that argument cannot prevail. The statute enlarges the jurisdiction formerly conferred by the Rules.

I agree to the disposition of the motion as stated by the learned Chief Justice.

MACMAHON, J.—I concur.

REGINA V. GRANT ET AL.

Jury Notice—Crown—Rule 364—Trial Judge.

The Crown coming into the High Court of Justice is in the same position as the subject; and a Judge, on the application of the Crown, can make an order striking out a jury notice given by the defendants.

Rule 364 applied.

Per OSLER, J. A.—If before the trial the Court or Judge has ordered that the action may be tried without a jury, the Judge presiding at the trial has no power to direct it to be tried by a jury.

[April 7, 1896.—*The Court of Appeal.*]

AN appeal by the Crown from an order of a Divisional Court (ARMOUR, C.J., and FALCONBRIDGE and STREET, JJ.) setting aside an order of ROBERTSON, J., whereby the jury notice served by the defendants was struck out, and restoring such notice. The action was upon two bonds given by the defendants for the due performance of the duties of the defendant Grant as collector of customs at Barrie.

The appeal was argued before HAGARTY, C. J. O., and BURTON, OSLER, and MACLENNAN, JJ.A., on the 2nd April, 1896.

F. E. Hodgins, for the appellant.

A. E. H. Creswicke, for the defendants.

Judgment was delivered on the 7th April, 1896.

HAGARTY, C. J. O.—It seems admitted that the only ground of the decision in the Divisional Court was that Mr. Justice Robertson had no jurisdiction to make the order striking out the jury notice, it being a proceeding at the suit of the Crown. It is an ordinary action in the Common Pleas Division, and the plaintiff moved to strike out the defendants' notice for a jury.

I think it clear that the Crown had the right to proceed by the ordinary machinery of an action as between individuals, and to avail itself of any right of a plaintiff in

such a cause. If so, the learned Judge could make the order as in an ordinary case.

The law is discussed in *Attorney-General v. Walker*, 25 Gr. 233, affirmed in appeal, 3 A. R. 195. The cases cited therein may be referred to as establishing the right of the Crown to sue in any Court.

I do not propose to discuss the question whether the subject is entitled under all circumstances to have a jury. I think the Crown, electing to sue in any of our Courts here, may avail itself of any of its provisions as to modes of trial, and that the person defendant in such suit must be subject to the mode of trial directed by the law of such Court.

In this view, I think the order striking out the jury notice was not made without jurisdiction, and that the judgment negating such jurisdiction cannot be supported.

BURTON, J. A.—That the Crown is entitled to sue in any of the Courts of this Province, would admit of no question, even if there had not been in the Exchequer Court Act a recognition of the right of the Crown to institute a suit in any of the Provincial Courts in any cases in which the Crown in the interest of the Dominion is plaintiff or petitioner.

This, in fact, is not questioned; but it is said, as the Crown is not expressly named in the statute or the Rules framed under its authority, it cannot invoke the aid of the Court to deprive the defendants of their right to have their case tried by a jury—a right which existed at common law, and of which they can only be deprived by express enactment.

It is contended on the other hand that, it being the undoubted right of the Crown to select its own forum, it must be bound, like any ordinary suitor, to submit to the practice and procedure of the Court as selected, and to the co-relative rights of such suitor.

The Crown having elected to sue in this Court, the defendants gave a jury notice, and a motion was made by

the Crown to strike it out ; a motion was at the same time pending to change the venue to Barrie, and counsel for the Crown, who claimed the ordinary right of the Crown to lay its venue where it pleased, consented to the venue being changed to Barrie, where the defendants reside, provided the jury notice were struck out, and upon this Mr. Justice Robertson, before whom the motion was pending, made an order to strike out the jury notice.

This was appealed against to the Divisional Court, which, it is admitted on both sides, reversed the order on the ground that the learned Judge had no jurisdiction, inasmuch as the Crown could not take advantage of the Rule which was passed for the benefit of ordinary suitors, and not of the Crown electing to sue in that Court.

That is, therefore, the sole question on this appeal, and I fancy no authority can be found upon the point.

With the utmost respect for the Court which has so decided, after giving the question every consideration, I feel myself unable to agree.

I have not arrived at this conclusion without considerable hesitation, opposed as it is to the decision of Judges of great experience, and for whose opinions I entertain a profound respect, but, after giving the question my very best consideration, it appears to me that the Queen, whose undoubted right it is to sue in a Court to which the Judicature Act applies, cannot be entitled to less rights than those of the meanest of her subjects.

It is, I imagine, clear that if the solicitors acting for the Crown had desired this case to be tried by a jury, they would have been compelled to give a jury notice, and that, having given it, it would be competent to the defendants to move to strike it out, and that the learned Judge before whom such motion was made might, in his discretion, have made an order to strike it out.

In this case no doubt exists as to the right of the defendants to a jury, unless a Judge in his discretion exercises his right under the statute to strike out the jury notice ; and I do not think the rights of the defendants are abridged

or enlarged by reason of the plaintiff in this case being the Sovereign.

I had written thus far before my attention was called to Rule 364, which seems to dispose of the objection of the defendants referred to above that the Rules do not refer to the Crown. That Rule expressly provides that the procedure in Crown actions for enforcing demands which Her Majesty may have against any person or persons shall be the same as that between subject and subject. This seems to narrow the question to the one point as to whether the mode of trial in any case is matter of procedure, and I humbly think it is.

I am of opinion, therefore, that the learned Judge had jurisdiction to make the order, and no sufficient ground has been shewn for interfering with it.

The appeal therefore should, in my opinion, be allowed.

OSLER, J. A.—The right of the Crown to bring actions in the Court of Queen's Bench for the recovery of debts due to it was decided, perhaps not for the first time, in *The Queen v. Bonter*, 6 O. S. 551, a *sci. fa.* on a recognizance given by the defendant as surety for a postmaster. Sir John B. Robinson there said: "We are of opinion that our statute, 34 Geo. III., ch. 3, gives to the Court all the jurisdiction in regard to the collection of debts due to the Crown, that belongs to the Exchequer in England." That jurisdiction would of course be vested in the High Court under the Judicature Act, and although a Dominion Exchequer Court has been established, it has in respect of claims such as are in question in this action merely concurrent and not exclusive jurisdiction: Exchequer Court Act, 50 & 51 Vict. (D.) ch. 16, sec. 17.

The prerogative of the Queen to choose her own forum and sue in one of her provincial Courts for such a demand is undoubted: *Attorney-General v. Walker*, 25 Gr. 233, 3 A. R. 195.

I refer also to *Cawthorne v. Campbell*, 1 Anstr. 205 note; *Corporation of London v. Attorney-General*, 1 H. L. C.

440; *Farwell v. The Queen*, 22 S. C. R. 553, judgment of Mr. Justice King, p. 556.

It might have been thought that without the aid of any special enactment, the mode in which the remedy of the Crown would be pursued and the relief sought administered would be in accordance with the course and constitution of the forum selected as between subject and subject, so that the Crown, coming into a forum in which, as between subject and subject, trial by jury had ceased to be the general mode of disposing of issues of fact, except in certain specified cases, would be bound to follow, or would have the right to take advantage of, the prescribed practice in order to obtain a jury or to deprive the defendant of his claim for one. Before the introduction of the modern changes in the law with regard to trials of issues of fact, no question of this kind could have arisen, as all such issues in respect of a legal demand were triable by jury. If, however, special legislation was necessary, I think we have it in the 35 Vict. ch. 13, secs. 18, 19, 20; R. S. O. 1877 ch. 58, secs. 6, 7, 8, which are now to be taken as consolidated in Rule 364 (R. S. O. 1887, vol. 2, App. A., p. 2698), which provides that "the procedure and forms which are from time to time in force for the prosecution of rights, claims or demands, or for the recovery of any lands, deeds or personal property between subject and subject, shall be used in the like cases for the prosecution of rights, claims or demands which Her Majesty may have against any person or persons, body or bodies corporate, or for the recovery of any lands, deeds or personal property whereto Her Majesty claims to be entitled."

As regards the procedure to be adopted in obtaining or dispensing with a jury, I think the Crown, coming into the High Court, is in the same position as the subject, and, therefore, that Robertson, J., had jurisdiction at the instance of the Crown to order that the issues of fact in this case should be tried without a jury. His order was reversed by the Divisional Court, not as a matter of discretion, on the ground that the issues were such as, under

the circumstances, ought to be tried by a jury, but on the ground of absence of authority in the learned Judge to make it. As I think he had authority, I am of opinion, with great respect, that his order should be restored.

It may be observed that by sec. 24 of the present Exchequer Court Act it is expressly enacted that all issues of fact and inquisitions shall be tried by the Judge of the Court without a jury ; so that, had that Court been selected by the plaintiff in which to prosecute this action, it would necessarily have been so tried.

It was said that, even if the order of Robertson, J., were restored, it might be rendered nugatory by the action of the trial Judge, who might, notwithstanding it, order that the issues should be tried by a Judge. Had this been the case, I should have declined to interfere, even though of opinion that the order of the Divisional Court was erroneous. But it appears to me that the suggestion is not well founded.

Section 78 of the Judicature Act (R. S. O. ch. 44) enacts that, except as previously excepted and subject to the provisions of sec. 80, all causes, matters and issues shall, unless a prescribed notice for a jury is given, be tried without a jury.

Section 79 ; where such notice has been given, the issues of fact shall, subject to the provisions of sec. 80, be tried and determined by a jury, but the parties present at the trial may consent that the jury shall be waived, and then the Judge shall try them without a jury.

And sec. 80 enacts that, notwithstanding anything in the next preceding two sections contained—*i.e.*, where a jury has not been demanded, or where, having been demanded, it has been waived by the parties at the trial—the presiding Judge may in his discretion direct that the action or issues shall be tried by a jury.

Then the section continues : “ And upon application to the Court in which the action is pending, or to a Judge thereof, by an order made before the trial, or by the direc-

tion of the Judge presiding at the trial, the issues may be tried and damages assessed *without* a jury."

The power of the Judge presiding at the trial to order that the issues shall be tried by a jury would seem to be confined to the cases referred to in the first part of sec. 80, viz., where neither of the parties has required a jury, or where, having so required it, they have agreed to waive it. But if, *before* the trial, the Court or a Judge has ordered that the action may be tried without a jury, I do not see anything in the Act which gives the presiding Judge power, notwithstanding that order, to say that the issues shall be tried by a jury. While it stands unreversed, the mode of trial must, I think, be that which the order prescribes.

In the consolidation of these sections in the Judicature Act of 1895, a curious slip has occurred, which does not, however, affect their construction. It is corrected by the Act passed this day, 59 Vict. ch. 18, sec. 2, sched. (18.)

MACLENNAN, J. A., concurred.

Appeal allowed.

SPENCE V. GRAND TRUNK R. W. CO. ET AL.

Statutes—Law Courts Act, 1896—Amendment—Procedure—Pending Actions—Judgment not Entered—Leave to Appeal—Grounds.

By paragraph 7 of the schedule to the Law Courts Act, 1896, sec. 73 of the Judicature Act, 1895, was amended so as to enable a Divisional Court and the Court of Appeal, and any Judge thereof, to grant leave to appeal in cases where no absolute right to appeal exists, and where, under the law as it stood before the amendment, no such leave could have been obtained :—

Held, that, being a matter of procedure, it applied to pending actions. *Watton v. Watton*, L. R. 1 P. & M. 227, followed.

2. That where at the time the amending statute was passed the judgment of the Court had been pronounced, but had not been entered up, the action was still pending.

Holland v. Fox, 3 E. & B. 977, and *In re Claggett's Estate*, 20 Ch. D. 637, followed.

Leave granted to appeal to the Court of Appeal from an order of a Divisional Court affirming, but on different grounds, the judgment at the trial dismissing the action, where no lapse of time had occurred to prejudice the plaintiff's claim to the consideration of the Court, the injury for which he sued being a serious one, and there being no authority upon the question of law decided by the Divisional Court.

[April 22, 1896.—*Divisional Court.*]

APPLICATION by the plaintiff for leave to appeal to the Court of Appeal from an order of a Divisional Court affirming a judgment dismissing the action.

The action was tried before MEREDITH, C. J., who gave judgment dismissing the action. The plaintiff then, having the option of appealing either to a Divisional Court or to the Court of Appeal, appealed to a Divisional Court. His appeal was dismissed, but upon grounds different from those upon which the action had been dismissed by MEREDITH, C. J. The judgment of the Divisional Court was delivered on 16th March, 1896, (27 O. R. 303.) As the law stood at that time, sub-sec. 2 of sec. 73 of 58 Vict. ch. 12 (O.) prevented any further appeal. By the Law Courts Act, 1896, assented to on 7th April, 1896, a discretion was given to a Divisional Court to allow in certain cases a further appeal to the Court of Appeal, and the plaintiff now applied for this leave.

Notice of the application was served on 4th April, 1896, and the motion was heard by a Divisional Court (FALCONBRIDGE and STREET, JJ.), on 13th April, 1896.

J. J. Maclaren, Q. C., for the plaintiff.

W. M. Douglas, for the defendants the Grand Trunk Railway Company.

W. Nesbitt, for the defendants the Canadian Pacific Railway Company.

On the 22nd April, 1896, the judgment of the Court was delivered by

STREET, J.—The amendment to the 73rd section of the Judicature Act, 1895, enacted by the 7th paragraph of the schedule to the Law Courts Act, 1896, amends the procedure of the Courts by enabling the Divisional Court and the Court of Appeal, and any Judge thereof, to grant leave to appeal in cases where no absolute right to appeal exists, and where, under the law as it stood before the amendment, no such leave could have been obtained. Being a matter of procedure, it applies to pending actions, according to the accepted rule of construction: "Although a suitor may have a vested right to a decree, the mode and method in which he is to approach the Court to obtain it, and the time in which that or any other step in the cause is to be taken are merely auxiliary to that right, and may be changed either by the Legislature or by the Rules and Orders of the Court without any infringement of the right itself:" *Watton v. Watton*, L. R. 1 P. & M. 227, 229.

At the time the amending statute was passed, viz., on 7th April, 1896, the judgment of the Court had been pronounced, but had not been entered up, and the action was, therefore, I think, a pending action: *Holland v. Fox*, 3 E. & B. 977, 985; *In re Clagett's Estate*, 20 Ch. D. 637, 653.

The case being, therefore, brought within the scope of the amendment, the sole question remaining is one of judicial discretion, whether we should, under the circumstances, give the leave which is asked.

So far as the time at which it is made is concerned, the amendment of the law followed so quickly after the delivery of the judgment of the Divisional Court, and the application for leave was made so promptly after the amendment of the law, that, if the leave had been given when the application was made, the notice of appeal might easily have been served within the month allowed for the purpose in ordinary cases. So that no lapse of time has occurred to prejudice the plaintiff's claim to the consideration of the Court.

Then the matter in controversy between the parties involves a question of law as to which there have been differences of opinion on the part of the Judges before whom it has come. The Chief Justice of the Common Pleas dismissed the action upon a ground which was not thought tenable by the Divisional Court, who dismissed it upon a different ground. This, I think, brings the case within the 4th sub-section of sec. 73 of 58 Vict. ch. 12, and gives us a right to exercise a discretion in the matter.

The injury sustained by the plaintiff was an extremely serious one, and, in view of the absence of authority upon the ground taken in the judgment of the Divisional Court, I think we may properly give him leave to take the opinion of the Court of Appeal upon it. He should, however, give security to the defendants for the costs of the appeal, according to the former practice, and, unless this is done within one month, the motion is to stand dismissed with costs. If security is given, then the costs of this motion will form part of the costs of the appeal.

McCORMICK V. TEMPERANCE AND GENERAL LIFE ASSUR-
ANCE COMPANY OF NORTH AMERICA.

Security for Costs—Appeal to Court of Appeal—Special Order—Judicature Act, 1895, sec. 77.

Standing alone, the appellant's poverty is not a circumstance, within the meaning of sec. 77 of the Judicature Act, 1895, entitling the respondent to a special order for security for costs.

[April 22, 1896.—*Osler, J. A.*]

MOTION by the defendants under sec. 77* of the Judicature Act, 1895, for a special order requiring the plaintiff to give the defendants security for the costs of an appeal by the plaintiff to the Court of Appeal from an order of a Divisional Court.

The motion was argued before OSLER, J. A., in Chambers, on the 14th February, 1896.

W. H. Blake, for the defendants.

L. G. McCarthy, for the plaintiff.

Judgment was delivered on the 22nd April, 1896.

OSLER, J. A.—In the face of the general rule announced by the Legislature, I am always unwilling to give such a direction. Something more than the appellant's poverty must be shewn to satisfy me that I ought to impose conditions on her appeal. Standing alone, that is not, in my opinion, a special circumstance within the meaning of sec. 77. For a wealthy appellant it is no hardship to give security, nor does the respondent need it. If the poverty of the appellant is a reason for exacting or prescribing it, the Act might as well not have been passed.

Two cases before the full Court suggest where the line

*77. On an appeal to the Court of Appeal, from any court or judge
* * no security shall be required for costs or damages, unless such security is specially ordered by the court to which the appeal is made or a judge thereof.

may be drawn. One is *Church v. Livingstone*, 30th January, 1896, where security was ordered; the other *Confederation Life Association v. Kinnear*, 15th February, 1896, where it was refused. This case seems to be governed by or to be very much like the latter, and I therefore make no order.

MCALLISTER ET AL. V. O'MEARA ET AL.

Security for Costs—Class Suit—Insolvent Plaintiffs.

Security for costs was refused in an action brought by four ratepayers of a municipal corporation, on behalf of themselves and all others, against the corporation and reeve for an account of moneys received by the latter from the former, in spite of the financial incompetency of the plaintiffs, and the slight interest they possessed in the properties for which they were assessed, where the action was virtually the plaintiffs' action, and not that of third persons who were alleged to be putting the plaintiffs forward, and there was no contention that the action was frivolous.

Clark v. St. Catharines, 10 P. R. 205, distinguished.

[March 27, 1896—*The Master in Chambers.*]

[April 8, 1896—*Divisional Court.*]

AN application by the defendants for security for their costs of an action brought by four plaintiffs, alleging themselves to be ratepayers and inhabitants of the village of Hintonburgh, suing on behalf of themselves and all other ratepayers, against the reeve and corporation of the village, for the purpose of compelling the reeve to account for all moneys received by him from the corporation during the year 1895, and for the proceeds of land said to have been sold by the corporation, and for any other acts which were illegal on the part of the reeve.

The application for security for costs was made upon the grounds that the plaintiffs were not possessed of sufficient property to satisfy the costs of the action in case the defendants should be awarded such costs; that the plaintiffs had no interest in the subject-matter of the action; and that they had been put forward by other persons, who

were responsible for costs, in order that these persons might escape liability for costs in case of failure of the action.

The evidence shewed that a meeting of dissatisfied ratepayers of the village was held, at which the persons present agreed that an action should be brought, and the defendants alleged that this action was brought in pursuance of the agreement then arrived at, and was really the action of the persons present at the meeting, who put forward the plaintiffs because of their poverty. It also appeared that the plaintiffs were assessed in respect of properties in the village, but the defendants alleged that the plaintiffs were not the true owners, and actually paid no taxes.

The motion was argued before the Master in Chambers, on the 25th March, 1896.

W. H. P. Clement, for the defendants.

Watson, Q. C., for the plaintiffs.

Judgment was delivered on the 27th March, 1896.

THE MASTER IN CHAMBERS.—The plaintiffs claim to be ratepayers and inhabitants of the village, and it is only as ratepayers that they are entitled to bring the action. So far as the evidence shews, not one of these plaintiffs owns any real estate whatever in the village or elsewhere. The plaintiff Shepherd cannot be found to be cross-examined upon his affidavit, and the evidence shews conclusively that he is worthless and not a taxpayer. As to the plaintiffs McAllister and Wilson, they claim to be ratepayers on account of their wives' properties, but they own nothing themselves, and are not assessed as owners; they merely live in their wives' houses, and have not sufficient property of their own with which to satisfy costs. As to the fourth plaintiff, Howell, he is not an owner or tenant. He was owner in 1895 of the house assessed to him, but during that year he had it conveyed to his sister, who now owns it, and since then he has had no property; he has not suffi-

cient means to meet any costs. I find upon the evidence of these plaintiffs that they are not owners of any taxable property within the village, and are therefore not personally affected by the acts complained of by them against the defendants.

The evidence adduced before me indicates that these four plaintiffs have been put forward by other persons who are ratepayers, and who are interested in the matters complained of, but who do not, apparently, wish to make themselves liable for the costs of an action to test their rights.

In my opinion, this is a case in which security should be ordered before the action is allowed to proceed: *Hathway v. Doig*, 9 P. R. 91; *Clark v. St. Catharines*, 10 P. R. 205; *Little v. Wright*, 16 Gr. 576. See, as to interest of ratepayers bringing an action, *Wood v. Draper*, 24 Barb. (N. Y.) 187, following English authorities therein referred to. See also *Paterson v. Bowes*, 4 Gr. 170, and *Davidson v. Grange*, *ib.* 377.

The usual order for security will go.

The plaintiffs appealed from the order of the Master, and their appeal was argued before a Divisional Court composed of BOYD, C., and FERGUSON and ROBERTSON, JJ., on the 8th April, 1896.

Watson, Q. C., for the plaintiffs. The facts do not carry the case far enough to warrant the Master's opinion. The plaintiffs are all assessed as owners or tenants, and their names appear on the revised voters' list for the municipality. The evidence of putting forward is not sufficient. It does not appear that other ratepayers are paying the plaintiffs' solicitors. The cases referred to by the Master are distinguishable, and the difference is in my favour. I refer to *Wallbridge v. Trust and Loan Co.*, 13 P. R. 67; *Major v. Mackenzie*, 17 P. R. 18.

W. H. P. Clement, for the defendants. These plaintiffs are not real ratepayers; they are assessed, but do not own the property for which they are so assessed. This is clearly

within *Clark v. St. Catharines*, 10 P. R. 205, which is approved by Ferguson, J., in *Delap v. Charlebois*, 15 P. R. 45. The plaintiff was not indemnified in that case. The plaintiffs' interest, if any, is infinitesimally small, and this cannot be said to be their action, but is the action of those who held the meeting and agreed upon the litigation; the plaintiffs are simply carrying out the mandate of the meeting. I rely on *Delaney v. MacLellan*, 13 P. R. 63. Where we have to get our evidence from the opposite parties, slight circumstances are sufficient to shew that the action is not really the plaintiffs' action: *Major v. Mackenzie*, 17 P. R. 18; *Gordon v. Armstrong*, 16 P. R. 432.

At the conclusion of the argument, the judgment of the Court was delivered by

BOYD, C.—The Master has gone too far. Security for costs is to be granted only in exceptional cases; the usual rule is that a poor man may have his rights litigated, and his proceedings will not be stayed by a requirement to give security for costs, unless the action be frivolous; and it is not argued that this action is frivolous. This being a class suit, brought on behalf of all ratepayers, other people are necessarily interested with the plaintiffs, and that explains the meeting and combination of persons to promote the action. But the plaintiffs themselves have an actual interest as ratepayers. It may be that ratepayers contributing to the expenses of the action may be found liable to contribute to the costs, upon a proper application. But it is not necessary to decide as to that. Despite all that has been urged, this action is virtually the action of the plaintiffs, and that is the test: *Gordon on Costs*, p. 80. *Clark v. St. Catharines*, 10 P. R. 205, was obviously not the action of the plaintiffs, and that is the distinction between the cases.

The order for security will be vacated, and the costs here and below will be costs to the plaintiffs in any event.

RE MOWAT, A SOLICITOR.

Solicitor—Special Journey—Authority—Ratification—Bill of Costs—Block Charge—Taxation—Items—Appeal—Certificate.

A solicitor acted for a municipal corporation as solicitor and sole counsel in a matter in litigation which was contested in the High Court, Court of Appeal, and Supreme Court of Canada. The municipal council passed a resolution authorizing an application for leave to appeal to the Privy Council, a copy of which was forwarded to the solicitor, who thereupon, without specific instructions, proceeded to England for the purpose of obtaining leave, and while there drew upon the treasurer of the corporation a bill for a part of his expenses, which was honoured :—*Held*, that the resolution, the payment on account of expenses, and other acts of ratification, without protest as to the solicitor's course, were sufficient authority to him ; and he was entitled to tax against the corporation his expenses in transit and in residence in England, an allowance for services rendered in England as solicitor and counsel, and a *per diem* charge for waiting, having regard to his being absent from his own business.

The solicitor made a block charge of \$1,400 for his services, time, and expenses :—

Held, that it should be resolved into details and taxed in items.

An appeal from the certificate of taxation of a bill of costs between solicitor and client is to the Court, as if it were an appeal from a Master's report.

[April 10, 1896—*Divisional Court.*]

AN appeal by the corporation of the city of Toronto from the certificate or report of one of the taxing officers, dated 11th March, 1896, upon the taxation of a bill of costs of the solicitor, at the instance of the appellants.

The bill of costs in question related to the case of *Re Virgo and City of Toronto*, in which the solicitor acted for the city corporation, under a special retainer, as was not disputed.

The only item in question upon the appeal was one of \$1,400, taxed at \$1,300, for nine weeks' necessary absence from Toronto (where the solicitor practised) and expenses. The absence was owing to the solicitor having gone to England in May, 1894, to present before the Judicial Committee of the Privy Council a petition for leave to appeal from the judgment of the Supreme Court of Canada in the above mentioned case.

This appeal was upon the ground, as stated, that no instructions were given by the corporation for the attendance of the solicitor in England, and that the allowance of the item of \$1,300 was improper and incorrect.

The notice of appeal was dated the 14th March, 1896, and made returnable before a Divisional Court on the 23rd March, 1896.

The evidence before the taxing officer shewed that in April, 1894, a resolution was passed by the municipal council of the city of Toronto authorizing an application to the Judicial Committee for leave to appeal in the *Virgo* case, and payment of the expenses thereof.

A copy of this resolution was sent to the solicitor by the city clerk, through the standing solicitor for the city corporation.

The solicitor had no specific instructions to proceed personally to England to prosecute the application, but he stated that he thought it necessary in the interests of his clients to do so, and that the mayor and other members of the council were informed by him of his intention to do so and did not question the propriety of his so doing.

The solicitor also stated that before leaving for England he informed the city treasurer, who had refused to advance him money for disbursements, that he went on the understanding that his disbursements would be recouped as they were incurred, and that when in England he drew on the city treasurer for £50, which was paid.

The solicitor also stated that in October, 1894, he attended a meeting of a committee of the council having charge of legal business, and informed the committee of what had been necessarily done by him in conducting the application before the Privy Council, and no one present expressed any dissatisfaction, and apparently approved of what was done.

Some of these statements of the solicitor were denied and others explained and qualified by affidavits made by the mayor, treasurer, and standing solicitor for the corporation.

The appeal was argued before BOYD, C., and FERGUSON and ROBERTSON, JJ., on the 9th April, 1896.

Fullerton, Q.C., and *H. L. Drayton*, for the appellants. Nothing should be allowed in respect of the \$1,400

item, or, if anything, much less. Special instructions by the client were necessary to authorize an expensive and unnecessary trip of that kind: *Re Snell*, 5 Ch. D. 815; Gordon on Costs, p. 189. The clients must be informed of all the facts: *In re Blyth and Fanshawe*, 10 Q. B. D. 207; *In re Bevan*, 20 Beav. 146.

Shepley, Q.C., for the solicitor. There is no jurisdiction in this Court to hear the appeal. Under the present practice, if the appeal is as from a Master's report, it is properly brought before a Divisional Court: Law Courts Act, 1895, sec. 11 (2). But if, as recently held by two of the Judges in the Court of Appeal in *Re Robinson*, (*ante* p. 137), the appeal is as from the certificate of a taxing officer upon a party and party taxation, it should be brought before a Judge in Chambers, under Rule 851, within the proper time, and the provisions of Rules 1230 and 1231 must be complied with. The earlier cases—*Re Ponton*, 15 Gr. 355; *Exchange Bank v. Newell*, 9 P. R. 528; *McCallum v. McCallum*, 11 P. R. 179—turned upon the effect of G. O. Chy. 642; and *Re Crothers*, 15 P. R. 92, and *Ford v. Mason*, 16 P. R. 25, are, of course, against me. I rely on the reasoning of Burton and Maclellan, J.J.A., in *Re Robinson*. As to the merits of the appeal, it must be remembered that the solicitor was also the sole counsel for the city in all the Courts below the Privy Council through which the *Virgo* case travelled. The English cases are, of course, different in this respect. No doubt the solicitor's retainer was at an end when the judgment of the Supreme Court of Canada was given. The resolution of April, 1894, was communicated to him as a fresh retainer. The evidence shews ratification of the solicitor's action in going to England, which was undoubtedly taken in good faith.

Fullerton, in reply. The result of *Re Robinson* is in my favour; for the Court was evenly divided, and the judgment of the Court below, which entertained an appeal from a taxing officer's certificate as if it were a Master's report, was left standing. As to the combination of solicitor and counsel, the absolute power of the solicitor to employ himself as counsel should not be favoured.

The judgment of the Court was delivered on the following day by

Boyd, C.—The scope of the resolution of April, 1894, is explained by the action taken by Mr. Mowat in going to England to promote the application for leave to appeal, and by the action of the city in making payment on account of these expenses while the solicitor was absent in England, and other acts of ratification—without protest as to his having personally intervened in England as to this business.

But the lump item should be resolved into its details, that the matter may be taxed in items, shewing what disbursements and expenses were made in transit and in residence in England, and as to the particulars of services rendered in England as solicitor and counsel, and the *per diem* charge while waiting. The taxing officer is to give consideration to the solicitor's being absent from his own business in arriving at the proper result of compensation.

The amount charged is not to be increased, but the items are to be given making up the \$1,400, and it should be remitted to the taxing officer to reconsider this part of the bill on the particular items to be given by the solicitor.

Reserve costs till taxation completed, and then to be disposed of by a Judge in Chambers.

The objection to the jurisdiction is overruled.

[Subsequently, upon the solicitor bringing into the taxing office detailed items of the sum of \$1,400, amounting to \$2,237.50, in pursuance of the order of the Court, the taxing officer issued an appointment to consider the same, on the return of which the solicitor for the city corporation elected to abandon all further proceedings under such order, whereupon the taxing officer closed the reference, and so reported to the Court. On the 19th June, 1896, an order was made by Boyd, C., in Chambers, for payment by the city corporation to the solicitor of the costs of the appeal and reference back.]

ARDAGH ET AL. V. COUNTY OF YORK.

Revivor—Præcipe Order—Delay in Prosecution of Action—Change of Interests.

A statute passed in 1889 gave persons making certain claims a right to bring an action within a year. The plaintiffs brought such an action within the year, but did not proceed with it, and no proceeding was taken by either party, after the delivery of the defence in June, 1890, until, one of the plaintiffs having died in January, 1895, the action was revived in February, 1896, by a præcipe order. In the meantime changes had taken place in the interests of the parties :—

Held, that the order should not be interfered with. The old practice had been superseded, and the defendants, not having moved to dismiss, were not entitled to complain of the action being revived.

[April 7, 1896. —*Divisional Court.*]

THIS was an action brought under and pursuant to sec. 3 of 52 Vict. ch. 77 (O.), an Act respecting the York roads and the surveys thereof, assented to 23rd March, 1889, which provides as follows :—

3. Within one year after the passing of this Act any person claiming that any of the said roads as defined in the said plans encroaches upon his rights may notwithstanding this Act assert such claim and bring any action for that purpose which may be thought necessary ; and in case it shall be established that any encroachment has taken place, such person shall be entitled to compensation in respect thereof, to be determined, in the event of the parties differing as to the same, in the manner provided by the arbitration clauses of the Municipal Act, and the Court in which such action is pending may in the action make all such orders and give all such directions as may be necessary for the purpose of having such compensation so determined and when determined paid.

The action was begun by writ of summons issued on the 14th November, 1889, by Arthur Ardagh and Arthur Leonard, plaintiffs, against the corporation of the county of York, defendants.

The statement of defence was delivered on the 27th June, 1890.

Arthur Leonard, one of the plaintiffs, died on the 23rd January, 1895.

No proceeding was taken by any party, and the action lay dormant, from 27th June, 1890, until 19th February, 1896, on which date the plaintiffs' solicitors issued a præcipe order reviving the action in the names of Arthur Ardagh and Catharine Ann Leonard, executrix of the last will and testament of Arthur Leonard, deceased, plaintiffs, and the corporation of the county of York, defendants.

During the period between 27th June, 1890, and 19th February, 1896, portions of the lands of the plaintiffs, in respect of which they sued, were granted to several different persons; and on 27th April, 1894, what remained was partitioned by deed between the original plaintiffs. In none of the deeds was any reference made to the statute, nor was there any reservation made of the right to compensation for the alleged encroachment. On 3rd February, 1893, an agreement was executed by which the defendant corporation transferred all their rights in the Lake Shore Road, as defined by 52 Vict. ch. 77, to the corporation of the city of Toronto.

The defendants moved promptly to set aside the order of revivor, and their motion was heard on 13th March, 1896, before MEREDITH, C. J., who dismissed it.

The defendants then appealed to a Divisional Court, and their appeal was argued before BOYD, C., and FERGUSON and ROBERTSON, JJ., on the 7th April, 1896.

C. C. Robinson, for the defendants. The interests of all parties were changed during the time which the plaintiffs allowed to elapse. The plaintiffs, having been guilty of gross negligence in not proceeding with the action, should not be allowed to revive it. By sec. 3 of the statute, the time within which the action could be brought was limited to one year from the passing of the Act. The action should not be revived, or in effect again commenced, nearly six years after the expiry of that year. I refer to *Bland v. Davison*, 21 Beav. 312; *Hollingshead's Case*, 1

P. Wms. 742; *Egremont v. Hamilton*, 1 B. & B. 516; *Pearson v. Belchier*, 4 Ves. Jun. 627; *Fussell v. Dowding*, 27 Ch. D. 237; *Higgins v. Shaw*, 2 Dr. & War. 356; *Alsop v. Bell*, 24 Beav. 451, 464; *Parkinson v. Lucas*, 28 Beav. 627; *Lemesurier v. Macaulay*, 22 O. R. 316, 20 A. R. 421; *Irvine v. Macaulay*, 16 P. R. 181; *Chambers v. Kitchen*, 16 P. R. 219, 17 P. R. 3; Daniell's Ch. Pr., 6th ed., p. 297.

James Pearson, for the plaintiffs, contra.

Judgment was given at the close of the argument.

BOYD, C.—I think we should not interfere. The old practice has been superseded, and if a defendant does not choose to move to dismiss an action for want of prosecution, he cannot be heard to complain if an order of revivor is made against him.

FERGUSON and ROBERTSON, JJ., concurred.

RE DAVIS'S TRUST.

Trustee—Executor—Removal—Summary Application.

The Court will not upon a summary petition, or otherwise than in an action, remove a trustee or an executor *in invitum*.

[May 7, 1896.—*Street, J.*]

A PETITION was presented to the Court in the matter of the will of Isaac Davis, deceased, by his daughter, a legatee, praying for the removal of the sole executor and trustee under the testator's will, on the ground that he had become insolvent, judgments against him for debts with executions thereon unsatisfied being in the hands of the sheriff of the city of Toronto. The petitioner alleged that she feared that the trustee would mismanage the estate.

The petition was heard by STREET, J., in Court on the 7th May, 1896.

D. Macdonald, for the petitioner. The law as laid down in *Re Bush*, 19 O. R. 1, that the Court will not remove an executor from his position and appoint another in his stead, is now altered by 59 Vict. ch. 18, sec. 4 (O.), by which the High Court is empowered to remove an executor upon the same grounds as such Court may remove any other trustee, and may appoint some other person to act in his place. And by sub-sec. (3), the practice in force for the removal of any other trustee shall be applicable to proceedings to be taken under this section. In *Re Byrne's Trust*, 18 L. T. N. S. 631, the Court removed a trustee on petition. In *Coombes v. Brookes*, L. R. 12 Eq. 61, it was held that the Court would appoint a new trustee in place of one who had become bankrupt, whether he voluntarily resigned or not.

G. G. S. Lindsey, for the executor and trustee. Where a trustee is willing to act, the Court cannot remove him on petition, but an action must be brought for that purpose. By sec. 24 of the Judicature Act, 1895, the High Court has the same powers as the Court of Chancery in England possessed in 1857. By the English Trustee

Act of 1850 (13 & 14 Vict. ch. 60), sec. 32, the Court of Chancery has power to remove a trustee. But all the cases shew that the Court will not act on a petition if the trustee is willing to act, or if a dispute as to the facts will arise, but will require the parties to bring an action: Daniell's Chancery Practice, 6th ed., p. 2115; Lewin on Trusts, 8th ed., p. 1028; *Re Blanchard*, 7 Jur. N. S. 505; *Re Bridgman*, 1 Dr. & Sm. 164; *Re Combs*, 51 L. T. N. S. 45. In England the combined effect of sec. 32 of the Trustee Act and of the Bankruptcy Act, 1883, sec. 147, which in substance re-enacted the 117th section of the Bankruptcy Act of 1869, enables the Court to remove a trustee against his will, on petition, the words of the latter statute being "whether voluntarily resigning or not:" *Re Adams' Trust*, 12 Ch. D. 634. But we have no Bankruptcy Act here. *Re Byrne's Trust*, 18 L. T. N. S. 631, was an *ex parte* application, and the trustee did not resist. There is no case in in our own Courts where a trustee willing to act has been removed on petition.

Judgment was delivered at the close of the argument.

STREET, J.—There are no bankruptcy proceedings here, so the petitioner is without the benefit of that procedure. There is no case in our own Courts where a trustee *in invitum* has been removed. If there be ground for removing a trustee for misconduct or other cause, the application to the Court should be by action, as it was not the intention of the English Trustee Act, 1850, to deprive retiring trustees of their right to have their accounts taken in the presence of their *cestuis que trust*, or of their lien upon the trust estate for any balance due to them: *Re Blanchard*, 7 Jur. N. S. 505. In *Re Combs*, 51 L. T. N. S. 45, Cotton, L. J., says: "It has been the constant course of practice since this Act [the Trustee Act, 1850] came into operation to decline to decide litigiously against a trustee whose removal is sought that he ought to be removed from his office of trustee."

The petition must be dismissed with costs.

KNICKERBOCKER TRUST COMPANY OF NEW YORK ET AL.
V. WEBSTER.*Security for Costs—Interpleader—Party out of Jurisdiction.*

In a sheriff's interpleader the party out of the jurisdiction, whether claimant or execution creditor, may be ordered to give security for costs to his opponent in the issue; BURTON, J.A., dissenting.

[May 12, 1896.—*The Court of Appeal.*]

IN an action of *Webster v. Brockville, Westport, and Sault Ste. Marie R. W. Co.* the plaintiff obtained judgment against the defendants for a money demand, and issued execution thereon, under which the sheriff seized a certain quantity of railway ties. These ties were claimed by the Knickerbocker Trust Company of New York and by another foreign corporation under and by virtue of a certain mortgage or trust deed, or under and by virtue of certain bonds. Upon the application of the sheriff, an interpleader order was made directing the trial of an issue, in which the foreign corporations should be plaintiffs, and the execution creditor defendant, and in which the question for trial should be whether, at the time of the seizure by the sheriff, the ties were the property of the claimants as against the execution creditor.

Subsequently, upon an application by the execution creditor, the defendant in the issue, an order was made by the local Judge at Brockville requiring the claimants, the plaintiffs in the issue, to give security for the defendant's costs of the issue, upon the ground that the plaintiffs were foreign corporations resident out of the jurisdiction. Upon the appeal of the plaintiffs, this order was affirmed by ROSE, J., in Chambers, but upon a further appeal by the plaintiffs was set aside by a Divisional Court composed of FERGUSON and ROBERTSON, JJ.

From this order the defendant appealed to the Court of Appeal, and the appeal was argued before HAGARTY, C.J.O.,

and BURTON, OSLER, and MACLENNAN, JJ. A., on the 11th and 12th March, 1896.

G. G. Mills, for the appellant.

J. B. Clarke, Q. C., for the plaintiffs.

The following cases, as well as some of those cited in the judgments, were referred to by counsel: *Duncan v. Tees*, 11 P. R. 66, 296; *Winfield v. Fowlie*, 14 O. R. 102; *Doran v. Toronto Suspender Co.*, 14 P. R. 103; *Hogaboom v. Grundy*, 16 P. R. 47; *Re Parker*, *ib.* 392; *Apollinaris Co. v. Wilson*, 31 Ch. D. 632; *Belmonte v. Aynard*, 4 C. P. D. 221, 352; *In re Miller's Patent*, W. N. 1894, p. 4; *Cochrane v. Fearon*, 18 Jur. 568; *Watteeu v. Billam*, 3 DeG. & Sm. 516; *Vincent v. Hunter*, 5 Ha. 320.

Judgment was delivered on the 12th May, 1896.

OSLER, J. A.—This is an appeal by the defendant from an order of a Divisional Court (Ferguson, J., and Robertson, J.), reversing the order of a local Judge, affirmed by Rose, J., ordering the plaintiffs in an interpleader issue to give security for costs.

No reasons for judgment are reported.

It appeared that Webster, the defendant in the issue, was the execution creditor; that the goods seized by the sheriff were so seized in the possession of the execution debtors, a railway company; that the claimants set up title thereto as holders of bonds or mortgage bonds covering the property of the company; that they reside out of the jurisdiction; and that, upon the sheriff interpleading in respect of their claim, an order was made for the trial of an issue in the usual way, in which proceeding the claimants are plaintiffs, and the execution creditor defendant.

Being resident out of the jurisdiction, the claimants were ordered, in accordance with the long settled practice of the Court, to give security for costs.

I know of no reason why this order should have been interfered with, but it seems necessary now to refer to the authorities, and I will first cite some of the later cases.

In *Tomlinson v. Land and Finance Corporation*, 14 Q. B. D. 539, 542, Bowen, L. J., shews the peculiarity of the position of the parties to a sheriff's interpleader: "The claimant to goods seized under a writ of *feri facias* is usually bound to prove his title to them upon the trial of the interpleader issue; but this does not put the execution creditor into the position of an ordinary defendant; and when an interpleader issue has been directed and the sheriff has slipped out of the dispute, the parties who remain, that is, the execution creditor and the claimant, are both plaintiffs, they are not in the position of the parties to an ordinary action. The hand of the Court is set free, and it may use its discretion whether security for costs should be ordered."

The case shews, as the head-note states, that both the plaintiff and the defendant in the issue are in the position of plaintiffs in an ordinary action, and, therefore, that the defendant in the interpleader issue may be ordered to give security for costs in any case in which a plaintiff may be so ordered. Accordingly, it appearing that the execution creditors, who had been made defendants in the issue, were insolvent and in liquidation, they were ordered to give security for costs.

It will be noticed that the case does not decide that the claimant, the plaintiff in the issue, could not have been ordered to give security, had he been in a similar situation, but only that the execution creditor, who happened to be the defendant in the issue, was nevertheless so much a plaintiff that he ought to be ordered to do so.

The case of the claimant is really *a fortiori*.

Rhodes v. Dawson, 16 Q. B. D. 548, was not the case of a sheriff's interpleader, but some observations of Lindley, L. J., are of general importance. After referring to some of the authorities, he said: "In considering whether parties to interpleader proceedings ought to be required to give security for costs, the rules applicable to ordinary litigants ought to be observed. At the same time in applying these rules, the question, whether a party to an

interpleader issue is to be treated as a plaintiff or as a defendant, must be decided by the real merits of the case and not by the mere form of the issue itself. It may be that in some cases each party is as much a plaintiff as the other."

That case, and the case of *Re Ancient Order of Foresters and Castner*, 14 P. R. 47, very well illustrate the application of the rule to the parties to an interpleader issue not arising out of a sheriff's application, but the observation that in some cases each party is as much a plaintiff as the other, always or nearly always applies to the position of parties who are compelled to interplead at the instance of the sheriff.

For this proposition two cases may be cited which shew, *mutatis mutandis*, how it has been applied to the claimant and to the execution creditor. In *Williams v. Crosling*, 3 C. B. 957, an interpleader issue was directed between the execution creditor and the assignees in bankruptcy of the judgment debtor, of whose goods the sheriff had taken possession under a *fi. fa.* The execution creditor was defendant in the issue, but he was resident in Scotland. Being out of the jurisdiction, it was sought to make him give security for costs, and he was ordered to do so. Wilde, C. J., said: "If there had been no interpleader rule, but the sheriff had withdrawn from possession, leaving the execution creditor to his ordinary remedy, he could only have brought an action against the sheriff for a false return; and, in that case, he would have been compelled to give security for costs; he could in no other way have made his execution available. His situation, therefore, will not be altered by calling upon him to give security, he being defendant in an issue." Then the Chief Justice points out that if the sheriff had sold the goods and the claimants had been put to their action against him, "they would have had a defendant resident here, and amenable for costs. They now say to the execution creditor—'If you interfere with our remedy against the sheriff, by substituting as a defendant one who is out

of the jurisdiction of the Court, at least you should give us security for costs.' Seeing, therefore, that we shall neither place the execution creditor in a worse position, nor the assignees in a better, by ordering the former to give security, * * * I think the plaintiffs in the issue should have all such remedies for costs as ordinarily belong to litigants. The situation of the execution creditor is not in any degree prejudiced by his being made defendant in the issue; for his execution will not be defeated unless the assignees make out a prior title to the goods. As the execution creditor is calling on the Court to give effect to his execution, justice requires that he should give security for costs."

Then take the converse case of a claimant resident out of the jurisdiction, who is calling upon the Court to give effect to his title to the property seized. Had there been no interpleader order, and had the sheriff sold the goods, the claimant must have brought his action against the sheriff and the execution creditor, or one of them, and in that action he might have been compelled to give security for costs. Why should he not be ordered to do so when he becomes a party to an interpleader issue in which he must in like manner establish his claim? The same principle applies as in the case of the execution creditor, each party from his own standpoint being a plaintiff; and it was accordingly acted on in *Webster v. Delafield*, 7 C. B. 187, the other case I referred to, where a claimant who resided in Paris, claiming goods which had been seized as the goods of the execution debtor in the claimant's house in London, and in possession of his caretaker, was ordered to give security for costs.

In *Attenborough v. St. Katharine's Dock Co.*, 3 C. P. D. 450, 454, an interpleader application at the instance of the defendant, Bramwell, L. J., refers to the familiar practice thus: "It has been suggested that the defendants ought not to be allowed to interplead, because the claimant Lopez is a foreigner residing out of the jurisdiction of the High Court. That is no ground for rejecting this application,

although it may be a reason for making him give security for costs or barring him altogether"—i.e., in the event of his not doing so.

So in *Benazech v. Bessett*, 1 C. B. 313, 2 D. & L. 801, a similar case, where the order for security was made on an application subsequent to the interpleader order.

Where interpleader is directed on the sheriff's application the case cannot be compared to one in which a party is brought into Court against his will by his opponent, for by giving notice of his claim, which is in truth a notice that he means to sue the sheriff, unless the execution creditor is substituted as his mark, he comes voluntarily into Court. Both parties are actors—the one by his execution, the other by his claim—and the result of what they do simply is to set the sheriff in motion to relieve himself from liability to either. By his notice the absent claimant commences the litigation (even more so than does the execution creditor by his writ); all that the sheriff does is to substitute some one other than himself as defendant. If either party had been left to sue the sheriff according as he had executed or refused to execute the writ, he would have had to give security for costs. That has been the practice for as long as I have known it, viz., that, whether plaintiff or defendant, the party out of the jurisdiction must give security for costs to his opponent in the issue. *Lovell v. Wardroper*, 4 P. R. 265, shews that the execution creditor defendant might be ordered to do so; and in *Walker v. Niles*, 3 Ch. Chamb. R. 108, the order was made against the claimant.

In the last edition of Archbold's Practice before the Judicature Act, as in many previous editions, the practice is thus stated: "If the claimant or the execution creditor be resident abroad, the Court may make it part of the order that he shall give security for costs."

The respondent has cited *Re Percy Nickel Mining Co.*, 2 Ch. D. 531, a creditor's petition for winding up a company, which was opposed by a shareholder residing out of the jurisdiction, and seems to rely upon some remarks of

the Master of the Rolls as to the rule requiring security to be given by a litigant residing abroad not applying to a person brought here to defend himself: "If the person who institutes proceedings chooses to bring here people out of the jurisdiction * * * he must take upon himself the risk of being unable to recover his costs, and cannot be allowed to say that the defendant whom he has chosen to bring here is not to defend himself."

The cases I have cited shew that this general proposition is inapplicable to the parties to interpleader proceedings, except within the limits of *Rhodes v. Dawson*, *supra*. Second, it does not touch the present case, because, from the execution creditor's point of view, the foreign claimants here are instituting the proceedings. And, third, as opposed to it may be cited the case *Re Compagnie Générale d'Eaux Minérales*, [1891] 3 Ch. 451, where a motion by a foreign company to rectify the register of trade-marks was opposed by another foreign company, and each was ordered to give security for costs to the other. See also *Sloggett v. Viant*, 13 Sim. 187; *Washoe Mining Co. v. Ferguson*, L. R. 2 Eq. 371.

We have no reason to suppose that the Divisional Court reversed the orders of the local Judge and Rose, J., as a matter of discretion, the usual case for security having been made out, nor indeed was it so argued. The appeal, therefore, should, in my opinion, be allowed and the orders in question restored.

As to when security for costs may be ordered to be given by a defendant who counterclaims, see *Neck v. Taylor*, [1893] 1 Q. B. 560, where the cases on the subject are cited.

HAGARTY, C.J.O., and MACLENNAN, J.A., concurred.

BURTON, J. A.—It seems to have been very clearly established by decisions in England, and notably by the Court of Appeal in *Rhodes v. Dawson*, 16 Q. B. D. 548, that the question whether a party to an interpleader issue is to be

treated as a plaintiff or a defendant must, on a motion of this kind, be decided by the real merits of the case, and not by the mere form of the issue itself.

Thus, the mere fact that a person is named as plaintiff in the interpleader issue does not necessarily entitle the defendant to call upon him to give security for costs, if he resides out of the jurisdiction, any more than, on the other hand, does the mere fact that a person is named as a defendant in the issue relieve such person from giving security, if his position is that of a plaintiff.

The question, with the one exception to which I shall presently refer—if it can properly be called an exception, for the remarks there made were mere dicta, although of Judges whose opinions were entitled to great weight—is, who is the plaintiff? the principle being thus stated by one learned Judge: that one who is substantially in the position of plaintiff initiating an action, and is a foreigner, is bound to give security for costs; and it is upon this ground that the execution creditor has always been treated on such an application as the party initiating the proceedings, and so liable to give security for costs; and I think I am safe in saying that in no case in England has a claimant whose goods have been seized by an execution creditor been ordered to give security for costs.

In *Tomlinson v. Land and Finance Corporation*, 14 Q. B. D. 539, the case to which I have referred, in which the dicta I have referred to occurred, viz., “that the execution creditor and the claimant were both plaintiffs,” the actual decision was that although the execution creditors were named in the issue as defendants, they, having initiated the proceedings by seizing the goods, were really plaintiffs, and, being insolvent, were liable to be called upon to give security for costs. I quite concede that if those dicta are to be regarded as binding, they are conclusive of this case.

That case is referred to in *Rhodes v. Dawson*, and the dictum in that case was not followed, and commenting upon the Rule, Lord Justice Lindley lays it down that there

is no greater discretion under the Rule than there was under the Act, and that the authorities to which he had previously referred shew that in considering whether parties to interpleader proceedings ought to be required to give security for costs, the rules applicable to ordinary litigants ought to be observed, and he qualifies the dictum referred to by saying, "it may be that in some cases each party is as much a plaintiff as the other."

In *Williams v. Crosling*, 3 C. B. 957, referred to in *Tomlinson's* case, the creditors, though named as defendants in the issue, were the execution creditors, and were held to be the real plaintiffs, and, being resident abroad, were, in consequence of their being in substance and reality the plaintiffs, ordered to give security for costs.

Jessel, M. R., states the general rule thus: "The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the Court compelled to give security for costs. That is perfectly well-established and a perfectly reasonable principle; but it does not apply to a defendant or respondent who is brought here to defend himself. If the person who institutes proceedings chooses to bring here people out of the jurisdiction, he must, in the first instance, consider whether or not it is worth his while to do so, even if he does not get costs. He must take upon himself the risk of being unable to recover his costs, and cannot be allowed to say that the defendant whom he has chosen to bring here is not to defend himself:" *Re Percy Nickel Mining Co.*, 2 Ch. D. 531. That, it is true, was a creditor's petition for winding up a company, but the principle is the same as in an interpleader proceeding. The execution creditor is the attacking party; he seizes property which is alleged to belong to a party residing abroad. Is the latter to lose his property unless he can furnish security for costs?

It might well be different if the claimant was the person initiating the proceedings.

I have examined the cases cited in our own Courts, and find nothing in conflict with the view taken by the Divisional Court whose judgment is before us in appeal. Most of those cases deal with the question of who should be plaintiff and who defendant in the interpleader issue, but, as I have pointed out, it was still open to the Divisional Court to decide who were the initiating or attacking parties, and, in considering the question of security for costs, the execution creditors were to be considered as plaintiffs and alone liable to give security.

One case cited from 12 P. R. (*Swain v. Stoddart*, p. 490) decides merely that execution creditors may be called on to give security.

The decision of the learned Chancellor in *Re Ancient Order of Foresters and Castner*, 14 P. R. 47, goes far to sustain the judgment. It was there objected that security for costs could not be ordered in interpleader proceedings, which he very properly overruled. He then signifies his approval of the rules laid down by Lindley, L.J., in *Rhodes v. Dawson*, and, after referring to *Tomlinson's* case, comes to the conclusion that the claimant in that case was the person substantially and in fact moving the proceedings—that the attack came from her. Not so in the present case, where the claimants' property has been seized and they are brought into the litigation.

We are now called upon to say that the Divisional Court who have so held were wrong. I am not prepared so to hold, and, in the absence of any authority for a person in the position of a real defendant being called upon to give security, I feel that I should not be justified, according to the well settled rule in appellate courts, in reversing the judgment below, even if I felt much graver doubts than I do of its correctness. Gravely to doubt, it is said, is to affirm.

I am of opinion, therefore, that it is our duty to dismiss the appeal.

It is to be noted that objection was taken that security should have been moved for as a condition to the issue

being ordered, and that the motion is too late.* That may possibly have influenced to some extent the decision of the Court below. I have not considered it, as, for the reasons I have given, I think we ought not to interfere.

Appeal allowed with costs,
BURTON, J. A., *dissenting.*

RE TORONTO, HAMILTON, AND BUFFALO RAILWAY COMPANY
AND HENDRIE ET AL.

Appeal—Divisional Court—Railway Act—Order of Judge—Persona Designata.

A Judge making an order under sec. 165 of the Dominion Railway Act, 51 Vict. ch. 29, for payment out of Court of compensation moneys, acts, not for the Court, but as *persona designata* by the statute; and no appeal to a Divisional Court lies from his order.
Canadian Pacific R. W. Co. v. Little Seminary of Ste. Thérèse, 16 S. C. R. 606, followed.

[June 16, 1896.—*Divisional Court.*]

AN appeal by William Hendrie the younger and others, the land-owners, from portions of an order made by FALCONBRIDGE, J., upon an application by the appellants for payment out of Court to them of moneys paid in by the railway company as compensation upon an expropriation of land for the purposes of their railway under 51 Vict. ch. 29, sec. 164 (D.). The appellants objected to the order because it allowed them interest only at the bank deposit rate (three per cent.) instead of the legal rate, and because it did not allow them the costs of the application.

The appeal was argued before a Divisional Court composed of MEREDITH, C. J., and ROSE, J., on the 9th June, 1896.

* But see *Re Smith, Bain v. Bain*, [1896] W. N. 88 (16).—REP.

E. Martin, Q. C., for the appellants.

D'Arcy Tate, for the railway company, objected that no appeal lay.

Judgment was delivered on the 16th June, 1896.

MEREDITH, C. J.—It is objected that there is no jurisdiction to hear this appeal, as the order complained of was made by my brother Falconbridge as a *persona designata* under sec. 165 of the Railway Act, 51 Vict. ch. 29 (D.)—and not by him sitting for the Court.

The case of *Canadian Pacific R. W. Co. v. Little Seminary of Ste. Thérèse*, 16 S. C. R. 606, is a conclusive authority in favour of the objection, and the appeal must therefore be dismissed; but, as the objection was not taken until after the merits had been argued, it should be without costs.

ROSE, J., concurred.

RE BOKSTAL.

Creditors' Relief Act—Fund in Court—Payment out—Execution Creditors—Sheriff—Distribution.

Where the surplus proceeds of a mortgage sale were paid into Court by the mortgagees, and claimed by execution creditors of the mortgagor, whose executions were in the hands of the sheriff at the time of the sale :—

Held, following *Dawson v. Moffatt*, 11 O. R. 484, and having regard to the provisions of sec. 24 of the Creditors' Relief Act, R. S. O. ch. 65, that the fund in Court should be paid to the sheriff for distribution in accordance with the provisions of that Act.

[June 11, 1896.—*Meredith*, C. J.]

APPLICATIONS by certain execution creditors of one Bokstal for an order for payment of their claims out of a fund in Court, consisting of a sum of money paid in, under the provisions of the Trustees' Relief Act, by the Ontario Loan and Debenture Company, and representing the surplus of the proceeds of the sale of the lands of Bokstal, mortgaged to them, which remained after satisfying their claim. The execution creditors had at the time of the sale executions against the lands of the mortgagor in the hands of the sheriff of the county of Essex, in which county the mortgaged lands lay.

The application was heard by MEREDITH, C. J., in Chambers, on the 17th April, 1896.

L. G. McCarthy, for the execution creditors other than Balfour.

Geary, for Balfour.

F. C. Cooke, for the mortgagor.

Judgment was delivered on the 11th June, 1896.

MEREDITH, C. J.—The applications are for payment out to the execution creditors, and the question is whether that order should be made or an order for payment to the sheriff for distribution under the provisions of the Creditors' Relief Act.

In *Dawson v. Moffatt*, 11 O. R. 484 (1886), before the passing of what is now sec. 24 of the Creditors' Relief Act, it was held by the Chancery Division that a fund in Court upon which an execution creditor had a charge must be distributed in accordance with the provisions of the Act. In that case it was referred to the Master to make the distribution, instead of directing the fund to be paid over to the sheriff for distribution by him; but by 49 Vict. ch. 16, sec. 37, now sec. 24 of R. S. O. ch. 65, it is provided that:

"Where there is in any Court a fund belonging to, an execution debtor, or to which he is entitled, the same, or a sufficient part thereof to meet the claims in the sheriff's hands, may, on the application of the sheriff or any party interested, be paid over to the sheriff, and the same shall be deemed to be money levied under execution within the meaning of this Act."

I must, therefore, following *Dawson v. Moffatt* and the provisions of sec. 24, direct that the fund in Court be paid to the sheriff of the county of Essex for the purpose of its being dealt with and distributed in accordance with the provisions of the Act.

The execution creditors' costs of the application will be paid out of the fund.

LEA V. LANG.

Security for Costs—Rule 1243—Costs of Former Action Unpaid—Solicitor—Want of Authority.

Upon an application by the defendant under Rule 1243 for security for costs, upon the ground that the costs of a former action brought against him by the same plaintiff for the same cause, and discontinued, remained unpaid, the plaintiff contended that the former action, though brought by a solicitor in his name, was brought without his authority:—*Held*, that there should be no discussion as to the incidence of the costs of a prior action, known to the plaintiff, he not having taken the proper steps to get rid of these costs prior to the launching of the second action.

[May 8, 1896.—*Meredith*, C. J.]

[May 21, 1896.—*Divisional Court*.]

AN appeal by the plaintiff from an order of the Master in Chambers, made under Rule 1243, requiring the plaintiff to give security for the defendant's costs of this action, upon the ground that the costs of a former action, brought by the same plaintiff against the same defendant for the same cause, and discontinued by the plaintiff, remained unpaid. The appeal was taken upon the ground, among others, that the former action, though brought in the plaintiff's name by Mr. Dumble, a solicitor, was so brought without authority from the plaintiff to the solicitor.

The appeal was argued before MEREDITH, C. J., in Chambers, on the 17th April, 1896.

N. F. Davidson, for the plaintiff.

Aylesworth, Q. C., for the defendant.

Judgment was delivered on the 8th May, 1896.

MEREDITH, C. J.—Appeal by the plaintiff from an order of the Master in Chambers requiring the plaintiff to give security for the costs of the action unless he should pay within four weeks the costs of a former action brought by him against the defendant in respect of the same cause of action, and the costs of the application.

The only question argued before me was as to the for-

mer action having been brought without authority of the plaintiff.

The rule is, no doubt, as contended by the appellant, that the onus of proving authority from the client, where it is denied by him, is upon the solicitor; but I am unable to say that the Master erred in determining in this case that the solicitor had satisfied that onus.

Looking at all the circumstances in evidence, and especially those relating to the discontinuance of the former action, the proper conclusion is, I think, that the solicitor who brought that action had the authority of the plaintiff to bring it.

The appeal must, therefore, be dismissed, and the costs of it will be costs in the cause to the defendant in any event.

The plaintiff appealed from this decision, and his appeal was argued before a Divisional Court composed of BOYD, C., and FERGUSON and ROBERTSON, JJ., on the 19th May, 1896.

N. F. Davidson, for the plaintiff.

Aylesworth, Q. C., and *F. J. Travers*, for the defendant.

Judgment was delivered on the 21st May, 1896.

BOYD, C.—When Lea was informed that the solicitor Dumble was about to discontinue, or that he had discontinued, the first action against Lang, his duty was to have taken such steps as would have relieved himself from the liability to pay costs to the defendant which would ensue from the ordinary notice to discontinue. If the position be right that Dumble had no authority to bring that action, then, if not sooner, was the time to have taken his stand and to have effectually repudiated that first action. His right then was to have had the proceedings stayed or discontinued without payment of costs on his part: *Reynolds v. Howell*, L. R. 8 Q. B. 398, and *Nurse v. Durnford*, 13 Ch. D. 764: and to have had the solicitor ordered to pay all costs, as in *Newbiggin v. Armstrong*, 13 Ch. D. 310.

The practical effect of his inaction is to make him liable to the defendant for the costs of that action. Now it is sought to shew that the first action being without authorization, no costs therein are properly due by the plaintiff—but that they are to be imposed on the solicitor Dumble. Now, I think that this change of liability should be the outcome of a direct application against the solicitor, and not be brought forward incidentally in a motion under Rule 1243. The inaction of the plaintiff has left him liable for the costs to the defendant, though it may not have precluded the plaintiff from proceeding directly against the solicitor for recoupment, if he can establish his position in a direct claim against the solicitor.

As a matter of convenience, and as a proper rule of practice, I should say that in an application under Rule 1243 there should be no discussion as to the incidence of the costs of a prior action known to the plaintiff, when the proper steps to get rid of these costs have not been taken by the plaintiff, prior to the launching of the second action.

I do not think that the order of the Chief Justice should be disturbed, having regard to all the circumstances of this case, but the plaintiff may have leave to elect whether to pay costs of the first action and this application or to give security.

It stands affirmed with costs; the plaintiff may have a month's further time to comply with the terms as to security, if he elects not to pay the costs forthwith.

If security is given, the costs of the appeal may be costs to the defendant in any event; but if the plaintiff elects to pay the costs of the former action, he should also pay the costs of the appeals, in which he fails.

FERGUSON and ROBERTSON, JJ., concurred.

Order accordingly.

CLARKSON ET AL. V. DWAN.

*Judgment—Summary Judgment—Writ of Summons—Special Indorsement
—Interest—Promissory Notes—Amendment.*

The indorsement of a writ of summons by which sums were claimed for interest upon promissory notes largely in excess of anything which could possibly be due except by virtue of some special contract, which was not alleged :—

Held, not a good special indorsement.

McVicar v. McLaughlin, 16 P. R. 450, distinguished.

Held, also, BURTON, J.A., dissenting, that the special indorsement was bad, and no amendment could be permitted, for the reasons given in the Court below, reported *ante* 92.

[May 12, 1896.—*The Court of Appeal*.]

AN appeal by the plaintiffs from the order and decision of a Divisional Court, reported *ante* 92, allowing the defendant's appeal from an order of the Master in Chambers, and dismissing the plaintiffs' motion for summary judgment under Rule 739. The facts appear in the former report and in the judgments printed below.

The appeal was argued before HAGARTY, C. J. O., and BURTON, OSLER, and MACLENNAN, JJ. A., on the 27th March, 1896.

A. R. Lewis, Q. C., for the plaintiffs.

F. A. Anglin, for the defendant.

Judgment was delivered on the 12th May, 1896.

HAGARTY, C. J. O.—The defendant was served with the writ specially indorsed as follows :—

SPECIAL INDORSEMENT.

Plaintiffs claim \$2,430.82 for goods sold and delivered to the defendant, and on promissory notes. The following are the particulars :—

1. To goods sold and delivered during the year 1894, to the defendant, by the Ontario Coal

Company of Toronto (Limited), whereof the plaintiff Clarkson is liquidator.....	\$ 355 55
2. To promissory note for \$1,000 dated 2nd April, 1894, made by the defendant, payable two months after date—	
Principal.....	1,000 00
Interest.....	100 00
Notarials.....	1 86
3. To promissory note for \$1,769.00 dated 20th April, 1894, made by the defendant, payable two months after date—	
Principal.....	1,769 00
Interest	165 14
Notarials.....	1 86
	<hr/>
	\$3,393 41

and assigned to the Lehigh Valley Coal Company, one of the plaintiffs herein.

CR.

1894—Aug. 5. By cash	\$200 00
Interest to date	16 00
	<hr/>
	\$216 00
Dividends by assignee and interest to date.....	746 59
	<hr/>
	\$962 59
Balance due.....	\$2,430 82.

I read this indorsement—as the learned Chancellor read it—as intimating a claim for goods sold by the Ontario Coal Company to the defendant, \$355.55.

And again—two promissory notes made by the defendant, not stating to whom, assigned to the Lehigh Valley Company, “one of the plaintiffs herein,” not stating by whom assigned. *Primâ facie* these are two distinct claims, one to Clarkson as liquidator, the other to the second plaintiff, the Lehigh Valley Company.

I can see no apparent connection between the two claims, nor any apparent reason for two distinct claims

being together. I agree with the Chancellor that this special indorsement cannot support the judgment signed.

The defendant duly appeared to the action in the Queen's Bench Division. In the Queen's Bench Division an order was obtained to sign final judgment for \$2,049.47. The balance claimed in the special indorsement was \$2,430.82, some hundreds of dollars more than allowed. I agree with the Chancellor that the Court should not be called on to give judgment as to one part of the claim in favour of the liquidator, and as to the other part in favour of the Lehigh Valley Company, or to allow the two claims put together by two plaintiffs to be made the subject of a compound judgment.

As to amendment, on the facts disclosed by the affidavits filed before the Master, it is open to the remark of the Chancellor that the function of the affidavits is to verify the cause of action stated in the special indorsement. They are not for the purpose of making a bad special indorsement good by a disclosure of facts not appearing there. I cannot agree with the dissentient Judge below that it was a case proper for amendment and that the order for judgment could be upheld. The case cited by him, *Roberts v. Plant*, [1895] 1 Q. B. 597, decided last year, involved a different question, as to whether an amendment made by the plaintiff could or could not be supported. There is no amendment made in the case before us. We have only to decide the sufficiency of the special indorsement.

The error as to the interest is fully noticed in the judgments of my learned brothers.

BURTON, J. A.—I regret to be unable to agree with the learned Chancellor that this indorsement is not sufficiently specific.

I quite agree that in cases where this summary remedy is given, its exercise, as it has been said, must be strictly watched, but that has been interpreted as meaning, not that effect will be given to every unsubstantial technicality,

but that care must be taken to see that the plaintiff has, in accordance with the terms of the Rule, made out a cause of action to which the defendant can have no possible defence.

We have long since abolished special demurrers to pleadings, but unless we are again to introduce them as to special indorsements, I can see no possible objection to this indorsement.

It first claims \$2,430.82, stating that that amount is made up of three items for goods sold and delivered to the defendant, and, secondly, on promissory notes, and it then proceeds to give particulars of those three items:—

1. For goods sold and delivered during 1894, to the defendant, by the Ontario Coal Co., whereof the plaintiff Clarkson is liquidator.

2. On a promissory note of \$1,000, stating date and date of maturity.

3. On other notes for \$1,769, stating date and date of maturity.

These constitute the whole claim mentioned in the first part of the indorsement, and then follows this statement: “and assigned to the Lehigh Valley Coal Company, one of the plaintiffs herein.”

It is said that this is confined to the notes; but is this not the purest hypercriticism? If well founded, why not confine it to the immediately antecedent paragraph, that is, to the last note, or, if not so confined, why should it not extend to each item of the claim, including the account for the goods delivered?

Surely this indorsement conveyed to the defendant Dwan the fullest information of what was being claimed. He knew that he was indebted on the notes; he knew that he was indebted on the open account; and passing over for the moment what has been referred to as a compound judgment, with which I shall deal presently, he might have seen that the whole had been assigned to the Lehigh Valley Company. If these claims had come within the Choses in Action Act, the Lehigh Valley Company could

have sued in their own name. Not being within that Act, because the claims were assigned simply as security, they could not do so, but would have been compelled to sue that portion of the claim consisting of the open account in the name of the Ontario Coal Company, if they had not gone into insolvency; it became necessary, therefore, to sue in Clarkson's name, in whom the legal title to the account had vested.

If the words I have referred to are to be restricted as suggested, it would follow that no cause of action, so far as the open account is concerned, would be shewn in the Lehigh Valley Company; no doubt it would have been more accurate to have stated that the notes and accounts were assigned to the Lehigh Valley Company as security only; the necessity for using the name of Clarkson would then clearly have appeared on the indorsement itself. The question is whether such an omission is fatal, but I submit, with great deference, but with some confidence, that the maxim "*Verba ita sunt intelligenda ut res magis valeat quam pereat*" applies, and so applied there is no difficulty in making the whole indorsement intelligible and consistent; and it would be rather a retrograde movement in these days, when efforts are being constantly made to simplify legal proceedings to hold that, in order to be entitled to specially indorsed writs, two actions were necessary, one in the name of the liquidator, the other in that of the assignee of the notes, where the beneficial plaintiff is compelled to sue part of his claim in the assignee's name.

Satchwell v. Clarke, 66 L. T. N. S. 641, and *Bradley v. Chamberlyn*, [1893] 1 Q. B. 439, the former a decision of the Court of Appeal in England, decide that it is not fatal to the validity of a specially indorsed writ that there is an omission of an averment which might be necessary in a statement of claim, and the defendant having come into Court relying on a technicality and without an affidavit of merits, judgment was allowed.

I think, with great respect, therefore, that this indorsement was sufficient in this respect.

It appears clearly that the defendant has no defence to the action; he does not deny his liability; whilst, on the contrary, it is sworn that he has admitted, over and over again, his liability for each of the items mentioned in the indorsement.

But the plaintiffs have been met from the first with every imaginable technical difficulty. First there was a motion to set aside the summons on the ground that the indorsement disclosed no cause of action in Clarkson, but shewed that the whole cause of action was in the Lehigh Valley Company, shewing clearly that the defendant construed the indorsement as I have done, and that he was aware that the Lehigh Company were the beneficial plaintiffs. That summons was dismissed. It could, of course, be no ground for setting it aside that the indorsement was defective, but it is important as shewing the defendant's own admission that the Lehigh Valley Company were the holders of all three claims, and Clarkson's name used as a mere matter of form, and the learned Master so adjudged, and included a statement to that effect in the order dismissing the application.

This was followed by an application for speedy judgment, which was granted after the amount of interest had been reduced by the Master. By some oversight the \$335 claim was omitted in the order, of which, however, the defendant could not complain.

But it has now been decided, by a liberal interpretation of the Rules in reference to amendment, that such an amendment as is authorized in a statement of claim is equally applicable to a special indorsement, so that no motion for leave to amend is necessary, but the plaintiff may himself amend as a matter of course: *Roberts v. Plant*, [1895] 1 Q. B. 597. It is true that where the plaintiff had asserted a claim which was not within Rule 245 at all, such, for instance, as, before the recent change in the Bills of Exchange Act, a claim for interest, if the plaintiff amended his indorsement, he would have to serve his writ afresh, because there was no more jurisdiction to entertain

such an improper claim for interest than there would be to entertain a claim for damages for assault, but where the claim is of a nature which can be properly made the subject of a special indorsement, any formal amendment, such as making the allegation of the assignment clearly extend to all the items, and that it was in the nature of security, can be made as of course, without re-serving the writ.

How then did this case stand when judgment was moved for? All question as to the evident meaning of the indorsement had been removed by the judgment of the Master, and if any amendment was required it could have been made as a matter of course by the plaintiffs without any application to the Court. The debt was due and had been frequently admitted, the objections to the motion were of the merest technical character, and the defendant was present to urge any defence, if any he had.

The learned Chancellor was evidently labouring under a mistaken view of the facts when he referred to the reason for Clarkson being made a party, overlooking the fact that the indorsement discloses that all three claims had been assigned to the Lehigh Valley Company alone, and that they therefore were the beneficial plaintiffs.

He treats it as if Clarkson was suing simply on behalf of the Ontario Coal Company, and this led him into the error of this being a "compound judgment," meaning, I assume, a joinder of two distinct causes of action in favour of different plaintiffs in the same suit, instead of the Lehigh Valley Company being, as distinctly appears in the special indorsement, the assignee and beneficial plaintiff on all the claims, and Clarkson's name being used merely to prevent the action being defectively constituted.

The affidavit, therefore, did serve its proper office of verifying the indorsement, which I quite concede it should do, and the learned Judge was mistaken in saying that it shewed that the special indorsement was not in conformity with the facts.

I may say that I intimated during the argument that the objection as to the interest was, in my opinion, of a much

more serious nature, and further consideration has convinced me that this is so.

Although, since the Bills of Exchange Act, the interest after the maturity of the note at the rate of six per cent. becomes a debt, and may be included in the special indorsement, if it is calculated at any higher rate, it is just as open to objection as the claim for interest was before the Act, and, I apprehend, could not be cured by amendment without re-serving the writ.

I was at first inclined to agree upon this point also with Mr. Justice Meredith, and it is clear that no injustice would be done by so holding in this case. But the difficulty I feel is this, that although I believe that in practice it is usual for the judgment clerk to compute the interest before entering the judgment, there is no Rule that I can find compelling him to do so, so that there is a possibility of a judgment by default being entered for interest computed at ten per cent.

It will be safer for parties instead of computing the interest to merely claim interest from the date of the maturity of the note, or other date from which it is payable.

I may say that I join in dismissing this appeal with deep regret, and feel that justice is being sacrificed to technicalities. If the present Rules do not allow a recovery in such a case as the present, "no merits," to use the language of one of the Judges in the case of *Roberts v. Plant*, "being sworn to or available," the sooner they are amended in the interest of the proper administration of justice the better.

OSLER, J. A.—The simple question on this appeal is whether the plaintiffs are entitled to summary judgment under Rule 739, and that depends upon whether, when the motion for judgment came on to be heard before the Master in Chambers, the writ of summons bore a good special indorsement for that purpose within the meaning of Rules 245 and 739. The defendant's right was to appear to the writ, and the plaintiffs' right was to have

summary judgment notwithstanding the appearance, if they could bring themselves within the Rules. The defendant resisted the motion in a way in which he was entitled to resist it, namely, by asserting that there was no valid special indorsement. He did not ask for leave to defend, nor was it necessary that he should do so, resisting the motion, as he did, on the ground only that the plaintiffs had not brought themselves within the Rule. Be there merits in the defence or be there none, the plaintiffs were not entitled to summary judgment if their writ was not in the first instance or by amendment specially indorsed as the practice requires. The absence of an affidavit of merits is, therefore, entirely beside the question, except in so far as it may predispose us not to yield too readily to any merely formal objection.

I do not mean again to go over the cases in which it has from the first been laid down that a plaintiff to entitle himself to this summary remedy must bring himself strictly within the Rules. The most recent case on the subject, *Roberts v. Plant*, [1895] 1 Q. B. 597, while not relaxing in any the least degree the former decisions, shews, nevertheless, that by exercising the right of amendment given by the Rules the plaintiff may amend his special indorsement and so convert a faulty one (where the claim is one which may be specially indorsed) into a good one. This he may do even after the motion for judgment has been launched. I do not see how that case helps these plaintiffs, because they never did in fact amend as they might have done, and the appeal comes before us, as it came before the Master and the Divisional Court, without any amendment.

That the special indorsement is on its face faulty needs no special pleading to shew, because sums are claimed for interest upon the two notes sued on largely in excess of anything which could possibly be due except by virtue of some special agreement to pay interest, and no such agreement or cause of action is shewn: *Gold Ores Reduction Co. v. Parr*, [1892] 2 Q. B. 14. Thus the case differs from

McVicar v. McLaughlin, 16 P. R. 450, where the sum claimed for interest was less than the plaintiff was apparently entitled to, being less than would have been due at the statutory rate. Here the interest is not claimed by way of computation at a specified rate from a certain time, so that it could be ascertained by the clerk from the indorsement on entering judgment. A sum certain is claimed absolutely. The clerk has no computation to make in such case. The plaintiff shews no title to it, and had judgment for non-appearance been signed, it must have been set aside.

Then there is the most extraordinary confusion in the statement of the plaintiffs' title to sue. The whole claim is by both plaintiffs, and yet it is said that the assignment of the three items composing it is to one of them only, thus shewing that Clarkson, the other, has no business to be upon the record as a plaintiff at all. Perhaps that is the proper way to read the averment as to the assignment, but if so, the plaintiff Clarkson could not have judgment. The affidavit filed on the motion shews how the difficulty arose, and that Clarkson should have been the only plaintiff, though I do not say it was improper to join the others. It seems that the claims were only assigned to them by way of security, and therefore, under the Choses in Action Act, they could not sue in their own name. In saying this, I must assume that the notes were not negotiable, and thus not capable of being indorsed or delivered to the plaintiff company. If they were negotiable, the company could properly sue for them in their own name, and the Act would not apply. There would then be two judgments, as the learned Chancellor says, one in the name of Clarkson and the other in that of the company. Neither the special indorsement nor the affidavit clearly shews the cause or causes of action.

On the whole, I do not see my way to reverse the judgment below. It would have been better for the plaintiffs to have amended their proceedings and renewed their motion, than thus to have pressed to the bitter end a proceeding of, at the very least, doubtful regularity.

I sympathize with the desire of Meredith, J., to avoid technicalities, but if parties will neither follow the rules of procedure nor amend, when the defect is not technical but matter of substance, as here, the Courts cannot help them.

MACLENNAN, J. A.—I am of opinion that the special indorsement in this case is not good. To comply with the Rules, it must be such that it would be right to allow judgment to be signed for the claim so indorsed, in the absence of the defendant, on the ground that by not entering an appearance he must be taken to have admitted everything stated therein. To answer that character, the indorsement must state, not in technical but in plain general terms, a legal cause of action by the plaintiff or plaintiffs against the defendant, such as, if proved as stated, would entitle them to judgment therefor. Let us now examine the indorsement. It is as follows:—

Plaintiffs claim \$2,430.82 for goods sold and delivered to the defendant, and on promissory notes. The following are the particulars:—

1. To goods sold and delivered during the year 1894, to the defendant, by the Ontario Coal Company of Toronto (Limited), whereof the plaintiff Clarkson is liquidator.....\$ 355 55
2. To promissory note for \$1,000 dated 2nd April, 1894, made by defendant, payable two months after date—

Principal.....	1,000 00
Interest	100 00
Notarials.....	1 86
3. To promissory note for \$1,769.00 dated 20th April, 1894, made by the defendant, payable two months after date—

Principal.....	1,769 00
Interest	165 14
Notarials.....	1 86

\$3,393 41

and assigned to the Lehigh Valley Coal Company, one of the plaintiffs herein.

CR.

1894—Aug. 5.	By cash	\$200 00
	Interest to date	16 00
		<hr/>
		\$216 00
Dividends by assignee and interest to date		746 59
		<hr/>
		\$962 59
Balance due.....		\$2,430 82.

Now, as pointed out by the learned Chancellor, the first item, taken by itself, shews a good cause of action in the plaintiff Clarkson as liquidator of the Coal Company, but in him alone, and not in his co-plaintiff the Lehigh Valley Company.

The other two items, taken by themselves, may be said to shew causes of action in both plaintiffs, because they may be taken to allege that both plaintiffs are the lawful holders of the notes, and the forms given in the Rules do not require it to be shewn how the plaintiff became the holder.

It will be observed that these three items are added together, making in all \$3,393.41, and after that follow the words: "and assigned to the Lehigh Valley Coal Company, one of the plaintiffs herein." In order to obviate the objection that the first item shews a cause of action in the plaintiff Clarkson alone, it is said that these last words must be taken to apply to all three items, and that they shew an interest in the Lehigh Valley Company in the item for goods sold as well as in the other items. Unfortunately, however, these words are too large. If read as contended, then, what they say is that the whole claim, for goods sold, notes, and all, has been assigned to the company, and that therefore there is no cause of action in Clarkson at all. That being so, I do not think a judgment could properly be signed for the claim; for two persons have no right to sue for, or to have judgment for, a claim due to

only one of them, and in which the other has or claims no interest.

I think also that the claim for interest is fatally defective. There is no time or rate mentioned for the computation of interest, but there are named sums claimed for interest on the notes. It is admitted that the sums so claimed are erroneous, if the statutory rate of interest, to be computed from maturity, is what is meant. That being so, I do not think the defendant could, on reading this indorsement, safely allow judgment to be signed against him in his absence, which is one object the Legislature had in view in providing for judgment in such cases. I think, too, the same uncertainty applies to the interest upon the credits. It is quite as important to the defendant that the credits to which he is entitled be stated with certainty, as the items of claim.

I therefore think the appeal should be dismissed.

SMITH ET AL. V. LOGAN ET AL.

Judgment—Appearance—Default—Tender—Notice—Irregularity—Motion for Judgment.

Until the law stamps have been attached to or impressed upon the paper upon which a judgment is drawn up, there is no complete, effective, or valid judgment; and an appearance tendered after all the work of signing judgment for default has been completed, except the attaching of the stamps, should be received and entered.

Where an appearance, though tendered before, is not entered by the officer until after, judgment, it cannot become an effective appearance until after the judgment has been set aside; and therefore the defendant cannot be said to be in default for not giving notice of appearance on the day on which it is entered, pursuant to Rule 281.

Where the plaintiffs insist upon the regularity of a judgment as a judgment in default of appearance, they are not in a position to take the alternative and inconsistent course of moving for judgment under Rule 739, treating the appearance as regular.

Where an appearance is entered after the last day for appearance but before judgment, the defendant has the whole of the day on which it is entered to give notice of the appearance under Rule 281.

Decision of the Court below, 17 P. R. 121, reversed.

[May 12, 1896.—*The Court of Appeal.*]

AN appeal by the defendant Wilson from the order of a Divisional Court, *ante* 121, allowing the plaintiffs' appeal against an order of a local Judge, and restoring a judgment entered as upon default of appearance, under the circumstances referred to in the former report and the present judgments.

The appeal was argued before HAGARTY, C. J. O., and BURTON, OSLER, and MACLENNAN, JJ. A., on the 16th March, 1896.

W. H. Blake, for the appellant.

Aylesworth, Q. C., for the plaintiffs.

Judgment was delivered on the 12th May, 1896.

OSLER, J. A.—This was an appeal by the defendant Wilson from the judgment of the Queen's Bench Divisional Court discharging an order made by the local Judge of the High Court at London, setting aside judgment entered on default of appearance to a specially indorsed writ.

The ground of irregularity stated in the notice of motion is that the judgment had not been actually entered by the plaintiffs when the appearance was filed with the clerk: the notice also referred to grounds disclosed in the affidavits filed. It would have been more accurate to say that the judgment had not been actually entered when the appearance was *tendered* to be filed, but I think the real objection to the judgment is stated with sufficient clearness to bring to the opposite party notice of what is complained of, which is the object of Rule 534.

Stating the facts most favourably for the plaintiffs, it appears from the affidavits filed on their behalf that on the morning after the last day for appearance their solicitor's clerk went to the Registrar's office, and, finding that no appearance had then been entered, proceeded to enter judgment, having taken the necessary papers with him for the purpose: the registrar or deputy clerk had taxed the costs, added them up, and signed his name on the margin of the judgment paper, but had not affixed or cancelled or received the law stamps, when a clerk of the defendant Wilson's solicitor came into the office and tendered an appearance to be filed, which the deputy refused to receive or take notice of before completing the entry of the judgment. The appearance was left in the office and entered in the procedure book, if at all, after the recording therein of the entry of judgment.

The Court below were of opinion, *dissentiente* Street, J., that the officer was not bound to leave what he was doing in order to receive and enter the appearance, and having begun to enter judgment had the right to complete it, and therefore that the appearance came too late.

The defendant's right and the officer's duty are defined by Con. Rules 281 and 287. By the former it is provided that a defendant may appear at any time before judgment: by the latter, that upon receipt of a memorandum of appearance, the officer shall *forthwith* enter the appearance in the procedure book. This is the practice which has prevailed ever since the Common Law Procedure Act; and

under it, it was held, nearly forty years ago, that an appearance was in time, even though filed while the plaintiff was entering judgment: *Harris v. Andrews*, 3 U. C. L. J. 31, 19 Dec., 1856. That case has never been overruled. I think it ought not now to be overruled, but to be followed as a practical and convenient exposition of the present Rules. Therefore I am unable, with all respect, to agree with the reasons assigned by the Court below for discharging the order of the local Judge.

The only question, then, is whether the judgment had been fully signed when the defendant tendered his appearance. As to this, I agree with my learned brethren of the Divisional Court that it had not. The law stamps payable in respect of the proceedings had not then been impressed or placed thereon. Until that was done there was no complete, effective, or valid judgment. That is the effect of the 7th section of the Act respecting Law Stamps, which enacts that no matter or proceeding whatever upon which a fee is due or payable, shall be issued or received or acted upon by any Court, or by any officer of any Court, until stamps corresponding in amount with the amount of the fee have been attached to or impressed upon the same. Therefore, I am of opinion that the appearance, though presented at almost, if not quite, the very last moment, was in time and ought to have been received and entered by the officer pursuant to the Rule.

The plaintiffs contended that even if their judgment was irregular, yet it ought to stand because the defendant had not given notice of his appearance on the day on which it was entered, as required by Rule 281. But as the appearance, though tendered before, was not entered by the officer until after, judgment, I do not see how this Rule can apply. It cannot become an effective appearance until after the judgment has been set aside, and therefore the defendant cannot be said to be in default for not having given notice. Indeed, the judgment would have been irregular had it been entered on the same day, *after* the

entry of the appearance, as the Rule gives the defendant the whole of that day in which to give the notice of its entry to the opposite party. This inflicts no hardship on the latter, whose search for appearance should be made immediately before entering judgment. If he finds the appearance entered, or if it is presented to the clerk even while entering judgment, as in the present case, there is nothing to prevent him from taking the next step in the cause at once, if he does not choose to wait until the following day and take his chance of being able to enter judgment as in case of non-appearance, in the event of the defendant making default in service of notice of the appearance under the Rule.

By the judgment of the Divisional Court it is ordered that the judgment against the defendant, and the executions and other proceedings issued and taken thereon, shall stand as security, and that the defendant shall be at liberty, on certain terms as to costs, to defend the action. For the reasons above given, I think the judgment was irregular, and that the order of the local Judge setting it aside should not have been interfered with, so far as regards the defendant Wilson.

Insisting, as the plaintiffs have done throughout, upon the regularity of their judgment as a judgment in default of appearance, they are not in a position to take the alternative and inconsistent course of moving for judgment under Rule 739, treating the appearance as having been regularly entered. Even if they were, I am not prepared to differ from the Court below in holding that the case is one in which the defendant should be allowed to defend, and in which the Rule ought not to be acted on.

The appeal must therefore be allowed, and the order of the local Judge restored, so far as regards the appellant.

MACLENNAN, J.A.—I am of opinion that this appeal should be allowed.

Mr. Aylesworth admitted that if the judgment was not signed when the appearance was tendered, the officer ought

to have paused and not to have gone on with the entry of judgment. He contended, however, that judgment had in fact been signed, and that the tender of the appearance was therefore too late. He argued that the affixing of the law stamps to the various proceedings was not essential, and that although that had not been done the judgment was nevertheless complete. I cannot agree with that contention. To do so would be contrary to the express words of sec. 7 of the Stamp Act, R. S. O. ch. 22. I think it is not sufficient to hand the necessary stamps to the officer; the solicitor should see that they are affixed and cancelled, and until that is done the proceeding cannot be said to have any validity. I think, therefore, the judgment was properly set aside, and that to that extent the appeal should be allowed.

Then there is the other question as to whether the order was right in allowing the judgment to stand as security with liberty to the appellant to defend the action. On this point also I am in favour of the appellant. The judgment was wrongly signed, and I think the defendant's affidavits, having regard to the special indorsement of the writ of summons, shew the case to be one in which he ought not to be deprived of the right of defence in the ordinary way. I therefore think the order of the learned local Judge ought to be restored, and that the plaintiffs should pay the costs both of the appeal and of the Divisional Court.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

SALES ET AL.

V.

LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY.

Amendment—New Defence—Court of Appeal.

The defendants were sued as common carriers for breach of contract to carry and deliver safely the plaintiffs' goods, and in the alternative, if the defendants had become warehousemen of the goods, for their loss and destruction by fire, caused by the defendants' negligence. The defendants denied the contract, and averred that the goods were safely carried to their destination, but that the plaintiffs left them in the defendants' hands at their own risk, and, if they were destroyed, it was without any negligence on the defendants' part. The only question at the trial was whether the fire was caused by the negligence of the defendants, and this, on the evidence, was found against them by the trial Judge. On appeal to the Court of Appeal the defendants for the first time sought to defend under the special conditions on the bills of lading, by which, it was contended, they were exempted from liability for loss by negligence in the character of bailees or warehousemen, and for loss by fire:—

Held, that the very right and justice of the case did not require the Court to permit the defendants to raise the new defence by amendment. *Browne v. Dunn*, 6 R. 67, applied and followed.

[May 12, 1896.—*The Court of Appeal.*]

An appeal by the defendants from the judgment of MACMAHON, J., who tried the action without a jury, in favour of the plaintiffs. The action was for damages for the loss of certain goods of the plaintiffs which were destroyed by fire while in the defendants' station at Merlin. The damages were assessed at \$3,000. The facts are stated in the judgment.

The appeal was argued before HAGARTY, C.J.O., and BURTON, OSLER, and MACLENNAN, JJ.A., on the 31st March, 1896.

Wallace Nesbitt, for the appellants.

D. E. Thomson, Q. C., and *W. N. Tilley*, for the plaintiffs.

Judgment was delivered on the 12th May, 1896.

OSLER, J.A.—I dispose of this appeal on a very short ground. The defendants are sued as common carriers for breach of contract to carry and deliver safely the

plaintiffs' goods. In the alternative it is charged that if the defendants had become warehousemen of the goods, their loss and destruction by fire was caused by the defendants' negligence.

The defendants deny the contract alleged; aver that the goods were safely carried to their destination, but that the plaintiffs left them in the defendants' hands at their own risk, and that if they were destroyed, the destruction was without any negligence on the defendants' part.

The case was tried before MacMahon, J. The only question raised on the trial was whether the fire by which the goods were destroyed was caused by the negligence of the defendants. That point was found against them; I think quite in accordance with the evidence. After the learned Judge had given a judgment—which seems in some way to have turned, as far as it was in favour of the defendants, on the ground that as to some of the goods sued for there was no privity of contract between these defendants and the plaintiffs, these goods having been delivered to the first railway which received them on a through contract—the bills of lading were handed in, and the judgment referred to was withdrawn or “recast,” and the judgment with which we are now dealing delivered. These bills of lading seem to have been put in for the purpose of shewing that, as to the goods referred to, there was really no through contract, the railway company to whom they were first delivered contracting as agents only for other lines beyond their own (including the defendants,) over which the goods were to be carried.

But no defence arising on the conditions was pleaded or raised before the trial Judge, and his judgment turns, as I have said, on the question of the negligence of the defendants regarded in the character of bailees or warehousemen of the goods. Now, the defendants, for the first time, on the appeal desire to defend themselves under the special conditions in the bill of lading, by which, as it is contended, they are exempted from liability for loss by negligence in that character, and for loss by fire.

I think we should not give the defendants leave to amend by pleading the conditions and raising such a defence at this stage of the case.

The case has been tried throughout as one of negligence, pure and simple, and I cannot see that the very right and justice of the case require us now to permit the defendants to raise the new and further defence that even if they were negligent, as the trial Judge has found, the plaintiffs had contracted to assume the risk of negligence, and that the defendants should not be liable for it. On the evidence the merits of the case are entirely with the plaintiffs. It appears to me to be a case in which we may well apply the rule stated in *Browne v. Dunn*, 6 R. 67 (1894), viz., that if a party at the trial deliberately elects to fight one question on which he is beaten, he cannot afterwards on appeal raise another question, although that question was at the trial open to him on the pleadings and on the evidence. It is true that in that case, as in *Martin v. Great Northern R. W. Co.*, 16 C. B. 179, where the same rule was acted upon, the trial was before a jury, while here the case was tried by a Judge without a jury, but I think the principle is the same, though in the latter case the same necessity for its strict application may not always exist.

On the question of amendment I refer to the recent case of *Odhams v. Brunning*, 12 Times L. R. 303 (C. A.), where in an action upon a guarantee the defendant, who had omitted to plead the Statute of Frauds, was not allowed to amend even at the trial. In *James v. Smith*, [1891] 1 Ch. 384, a defendant who had pleaded the wrong section—the 4th instead of the 7th—was not allowed to amend. See also *Steward v. North Metropolitan Tramways Co.*, 16 Q. B. D. 556; *Collette v. Goode*, 7 Ch. D. 842; *Edevain v. Cohen*, 41 Ch. D. 563.

I would dismiss the appeal.

HAGARTY, C. J. O., and BURTON and MACLENNAN, JJ. A., concurred.

Appeal dismissed with costs.

MULLIGAN V. HENDERSHOTT ET AL.

Partition—Summary Application—Mortgagee.

A mortgagee whose title has not been perfected by foreclosure or otherwise is not entitled to an order for partition or sale upon summary application under Rule 989.

[June 8, 1896.—*Meredith, J.*]

AN appeal by the official guardian *ad litem*, on behalf of the defendants, who were infants, from a summary order of the local Master at St. Thomas, made on the 22nd May, 1896, directing partition or sale of certain lands.

John A. Hendershott and his wife Sarah were owners of the lands in question. John made a mortgage to the plaintiff and died intestate, leaving the defendants entitled. Sarah conveyed her interest to the defendants, and died.

The appeal was argued before MEREDITH, J., on the 8th June, 1896.

F. W. Harcourt, for the appellant. A mortgagee is not entitled to partition upon a summary application under Rule 989 until he has perfected his title by foreclosure or otherwise: *Laplane v. Scamen*, 8 A. R. 557; *Train v. Smith*, before Spragge, C., 14th April, 1875, not reported; R. S. O. ch. 44, sec. 34, sub-sec. 5.

Treméear, for the plaintiff, contra, cited *Davenport v. King*, 49 L. T. N. S. 92; *Devereux v. Kearns*, 11 P. R. 452; *Fram v. Fram*, 12 P. R. 185; *Fall v. Elkins*, 9 W. R. 861; Knapp on Partition, p. 191; *Rich v. Lord*, 18 Pick. 322; *Baring v. Nash*, 1 Ves. & B. 551; *Heaton v. Dearden*, 16 Beav. at p. 150.

Judgment was delivered at the close of the argument.

MEREDITH, J.—The appeal must be allowed with costs.

I feel bound to follow *Train v. Smith*, in which the very point in question was decided more than twenty years

ago. There has been no contrary decision in this Province that I am aware of: nor has that decision been affected by any of the numerous changes since made, in the practice, by statute and rule of Court.

RUTHERFORD V. RUTHERFORD ET AL.

Parties—Action to Realize Charge on Land—Subsequent Incumbrancers—Master's Office—Right to Vary Judgment—Amount of Charge—Marshalling.

Legacy to plaintiff of a sum equal to one-fifth of their value charged upon two parcels of land, A. and B. Devise of both parcels subject to the legacy. The extent of the devisee's interest under the will in parcel A. uncertain. Agreement between the devisee and plaintiff fixing value of legacy at \$400, not registered. The devisee mortgaged both parcels separately to different mortgagees, who registered. Plaintiff proceeded against the devisee alone for the sale of parcel B. only for payment of the legacy as fixed by agreement, and obtained judgment by default with reference as to incumbrances.

Upon motion by the incumbrancers upon parcel B., who were added as parties in the Master's office, to set aside or vary the judgment:—

Held, reversing the decision of STREET, J., that there was no necessity, and no right on the part of the added parties, to alter or vary the judgment to enable them to question and reduce the amount of the charge fixed thereby as between the plaintiff and the defendant; and that as between them and the plaintiff the value of the charge was open in the Master's office, in the absence of notice.

2. That the added parties had the right of marshalling; but the plaintiff, having obtained a regular judgment, had a superior equity to theirs, and they had no right to deprive her of it, nor to involve her in the expense of construing the testator's will, and ascertaining what rights of the defendant in parcel A. were subject to the charge. If they chose they could redeem the plaintiff, and, standing in her place, at their own expense have recourse to the west half.

[December 2, 1895.—*Street, J.*]

[May 12, 1896.—*The Court of Appeal.*]

ON 23rd May, 1873, Charles Rutherford made his will in the following words:—

“ * * I direct that the rents and profits of my farm, being the north half of lot No. 9 in the 14th concession of the township of Cavan, shall be paid to my wife, Susannah Rutherford, for the support of her and the rest of my family while they remain together; but if they should separate, I direct that one-half of the rents and profits shall be paid to

my said wife, Susannah Rutherford, and the remainder shall be applied, at the discretion of my executors, for the education of my children while they are of school age, and afterwards for the use of my children, as my executors shall see most required. Third, I bequeath to my son Charles Rutherford, when he arrives at the age of twenty-one years, my said farm, being the north half * * forever, subject to the following conditions, that is, I bequeath to my said wife, Susannah Rutherford, the use of one-half of my said farm and dwelling-house during her life or while she remains my widow * * and I further direct that one-fifth part of the value of my said farm shall be paid to my two daughters, Margaret Rutherford and Sophia Rutherford, in equal divisions, the first division to be paid when my son Charles John Rutherford would be of the age of twenty-one years, the second payment to be paid when my daughter Sophia Rutherford when she is of the age of twenty-one years ; but should my said son John Rutherford neglect or refuse to pay the said sums to my said daughters, then they or each of them my said daughters may sell their share to whom they please at the valuation put thereon by my executors hereinafter named. And I also direct that at the death of my said wife, Susannah Rutherford, the remaining half or part that she occupied shall be equally divided or the value thereof between my three children, or such of them as may be then living, that is, Charles John Rutherford, Margaret Rutherford, and Sophia Rutherford * * .”

The testator died in the month of August, 1873, seized in fee of the north half of lot 9. His house was on the north-west quarter of the lot.

On 18th March, 1886, Charles J. Rutherford mortgaged the east half of the north half to Mary Best, and in November, 1889, Mary Best assigned the mortgage to Annie Sutcliffe.

On 18th April, 1891, Charles J. Rutherford mortgaged the east half of the north half to Valentine Best, and on

3rd June, 1893, Valentine Best assigned the mortgage to Joseph Rutherford and W. R. Shields.

On 16th February, 1892, Charles J. Rutherford paid certain moneys to his sister Margaret, and took a quit claim deed from her of the north-west quarter of lot 9. And on the same day he mortgaged the north-west quarter to Mary J. Bowers.

The original will was duly registered in the registry office in 1873, and the mortgages were also registered in the order of time of their execution, but the agreement hereafter referred to was not registered.

On 30th October, 1894, Sophia Rutherford began the present action against Charles J. Rutherford, alleging that the testator, Charles Rutherford, devised to the defendant one-half of his farm, subject to the payment of one-fifth of its value to his two daughters, Margaret and Sophia; that the legatees, by agreement with the executors, had fixed the amount of each legacy at \$400; and that the defendant had paid to Margaret her portion, but had not paid the plaintiff her portion; that by agreement between the defendant and his mother and sisters he had taken the east half of the farm as that devised to him. The plaintiff claimed \$400 with interest from 30th October, 1888, and asked that the east half of the north half of lot 9 might be sold to satisfy her claim. The defendant did not appear, and the plaintiff obtained, upon motion in Court upon default of statement of defence, a judgment declaring that she was entitled to a lien upon the east half of the north half of lot 9 for \$400, with interest from 30th October, 1888, and referring it to the Master at Lindsay to add incumbrancers on the said lands as parties in his office, and to take the usual accounts, and in default of payment to sell.

Under this reference the Master at Lindsay added Annie Sutcliffe, Joseph Rutherford, and W. R. Shields, above mentioned, as parties in his office in respect of the incumbrances above mentioned.

The parties so added, Rutherford and Shields, now moved to set aside the judgment or to vary it, upon the grounds :

1. That the charge of the legacies to the plaintiff and her sister is not confined by the will to the east half of the north half of lot 9, as declared by the judgment, but covers the whole of the north half of lot 9, and that it should so be declared.

2. That the judgment should have left open as a subject of inquiry the amount of the legacy, instead of fixing it at \$400.

The motion was argued before STREET, J., in Court, on the 19th November, 1895.

Masten, for the motion.

Moss, Q.C., for the plaintiff.

Judgment was delivered on the 2nd December, 1895.

STREET, J.—(after setting out the facts as above)—The will gives to each of the two daughters a charge for a legacy equal to one-tenth of the value of the farm. The plaintiff in her statement of claim says that, by agreement between her and the executors, this legacy has been fixed at \$400, and the defendant does not deny this, and the judgment proceeds to fix and ascertain that as her right. Had there been no one else interested in the amount of the legacy, this judgment would have been right in this respect; but, if the plaintiff wished for such a declaration, and that it should bind the persons to whom her brother, the defendant, had conveyed his interest as mortgagees, she could only effect her purpose by making them parties to the action before judgment, so as to give them an opportunity of contesting the alleged settlement. In other words, the sum cannot be fixed without notice binding upon them, or behind their backs; for it may, so far as appears, be a sum in excess of the plaintiff's real rights under the will. So that, even if there were no other objection to the judgment, it must, in my opinion, have been varied by striking out so much of it as declares and fixes the amount of the legacy and of the interest to be added to it. If the plain-

tiff were willing to leave it an open question, the amount could be ascertained upon the reference as a matter of computation : if she desired to adhere to her allegation that it had been fixed and ascertained by an agreement binding upon the added parties, she must make them parties to the original action, for the question so raised ceases to be a matter of account determinable as a matter of course in the Master's office, and becomes one as to the existence of a new agreement, which the defendants have a right to raise at a hearing, along with the questions as to whether it has been so made as to be binding upon them.

There is, however, another question, of at least equal importance to the mortgagees, which I think they are also entitled to raise at the hearing, and that is whether, upon the construction of the will, the plaintiff's lien is confined to the east half of the north half of lot 9, as the plaintiff has alleged. The defendants added in the Master's office contend before me that the lien extends to the west half of the north half as well, and that they are entitled to require that parcel of land to contribute towards payment of it, and the persons interested in it to be made parties and brought in. I do not think it is necessary for me to determine, at this stage of the proceedings, whether this contention is to be sustained or not, and I desire not to go further than is necessary, because the persons interested in the west half of the north half as mortgagees are not before the Court.

The will is, however, most inartificially drawn, and its construction is not easy. There is certainly on the face of the will a devise to the defendant of the whole north half, subject to certain conditions, and the payment of the plaintiff's legacy is apparently one of the conditions, so that, if the defendant took any interest in the west half of the north half, he certainly took it subject to a charge, along with his interest in the east half of the north half, for the amount of the plaintiff's legacy. The plaintiff, however, insists that the context shews that the testator did not intend to devise the whole north half to the defendant, but

only the east half of the north half, and that therefore the legacies are a charge only on the east half of the north half. The context principally relied on is that clause of the will in which the testator says, "and I also direct that at the death of my said wife Susannah the remaining half or part that she occupied" (which is admitted to be the west half of the north half) "shall be equally divided or the value thereof between my three children, or such of them as may be then living." The three children have all survived the widow Susannah, and the question is whether this clause is so inconsistent with the previous devise to the defendant of the whole north half as to require me to hold that when the testator said in the previous clause that he devised the north half of lot 9 to his son, he meant to say the east half of the north half. In my opinion, the plaintiff was not justified in treating her own construction as the correct one without giving the persons interested in contesting it an opportunity of doing so, and they should be allowed to do so at the hearing and not in the Master's office. The judgment should, therefore, be set aside, but, as she has a judgment binding upon the original defendant, fixing as against him the amount of the legacy at \$400, she should not be deprived of the benefit of this so far as he is concerned, and the order should provide that as against him and his ultimate interest, if any, in the proceeds of the sale of the land, in the event of a sale, the judgment should stand. The order upon this motion should direct the judgment with that exception to be set aside, and that the costs of the motion should be allowed against the plaintiff to the defendants who have moved, in any event of the cause, upon the final taxation. The plaintiff will have leave to amend her statement of claim; the order should recite that the defendants now moving have alleged that the interest of the defendant Charles J. Rutherford in the west half of the north half is subject with the east half of the north half to the plaintiff's legacy, and that it is considered by the Court that the persons interested in

the west half of the north half should be added as original parties to the action, and should order that they be added accordingly, naming them in the order. The plaintiff, with any other amendments she may be advised to make, may set out that the defendants now moving pretend that the west half of the north half is subject with the east half of the north half to the payment of the legacies, and that by order of the Court the defendants added by the order, being the persons interested in the west half of the north half, have been added as parties. All the defendants except the original defendant, Charles J. Rutherford, will be allowed to make full defence to the action. He, as well as the other defendants, should be served with the amended statement of claim, and all the defendants except those now moving should be served with the order made upon this motion.

The plaintiff appealed from this order, and her appeal was argued before HAGARTY, C.J.O., and BURTON, OSLER, and MACLENNAN, J.J.A., on the 12th and 13th March, 1896.

Moss, Q.C., for the appellant.

Watson, Q.C., and *Edmison*, for the respondents.

Judgment was delivered on the 12th May, 1896.

MACLENNAN, J. A.—(after setting out the facts)—The appellant contends that her action and judgment were perfectly regular and right; that, having a charge upon the east half, which is amply sufficient in value for satisfaction of her legacy, she ought not to be obliged to go to great expense in bringing other parties before the Court, at the instance and for the benefit of subsequent incumbancers who claim under the defaulting debtor, and who can easily get all they are entitled to by paying the plaintiff off and taking an assignment of her security. The respondents, on the other hand, insist on their right to have the plaintiff's securities marshalled for their benefit,

and to require the plaintiff to make whatever can be made out of Charles John's interest in the west half. I am of opinion that the appellant's contention is entitled to prevail.

It may be that the plaintiff's legacy is a charge upon some interest of the defendant Charles John in the west half; but the east half being clearly of sufficient value, I see no reason why the plaintiff might not neglect all supposed interest in the former and confine her action and her claim to relief to the latter. I know of no principle or authority forbidding her to do so. There is no evidence that the plaintiff knew of the subsequent mortgages until she went into the Master's office, and she might have released the west half from her charge altogether, and the present mortgagees could not have complained. She was, therefore, perfectly regular in claiming relief against the east half alone. Then she set up the agreement she had made with her brother, fixing the amount of her claim at \$400. He was bound by that agreement, and so was she. She could claim no more, and he could discharge himself by paying no less; and as between those two the sum agreed upon was properly ordered to be paid by the judgment. Even the respondents can hold the plaintiff to that sum, if it is for their interest to do so. They can adopt the agreement made by their mortgagor. The respondents being subsequent incumbrancers, the plaintiff was not required by the practice of the Court to make them parties in the first instance, and indeed it would have been improper for her to have done so. The proper time and place to make them parties was in the Master's office, and that is what was done. How, then, were they affected by the agreement fixing the amount of the charge? Was it necessary for them to have the decree altered in order to assert their rights? In my opinion, it was clearly not. They say that when they took and registered their mortgages they had no notice of the agreement, and it was not registered. If they had no notice, and if the sum agreed upon was more than the value when the legacy vested, they

were not bound by it, for then its amount depended on the agreement and not on the will; it had become something more than the registered charge, which alone was what they were bound by, and they could insist on the sum being reduced to the proper proportion of the value of the land, as expressed in the will, that is, as between them and the plaintiff. As to any excess the plaintiff would be postponed to them by the Master, just as in the case of any ordinary mortgage, as, for example, where a first mortgagee had made a further advance after the registration of subsequent mortgages. There was, therefore, in my opinion, no necessity, and no right on the part of the respondents, to alter or vary the original judgment to enable them to obtain their rights as against the amount of the charge fixed thereby as between the plaintiff and the debtor.

The remaining question is the right of marshalling. That the respondents have that right must be conceded: *Fisher on Mortgages*, 669, 663-4; *Coote*, 1063-1069; *Gibson v. Seagrim*, 20 Beav. 614; *South v. Bloxam*, 2 H. & M. 457; *Dolphin v. Aylward*, L. R. 4 H. L. 486, 505; *Seton on Decrees*, 1158-1161. But the right is a purely equitable one, and is not to be exercised to the prejudice of the first mortgagee: *Coote*, p. 1063. Here the plaintiff has obtained a judgment perfectly regular in form and substance, and has therefore a superior equity to that of the respondents, and the latter have no right to deprive her of it. They might have brought an independent suit offering to redeem the plaintiff, and upon doing so to stand in her place as against the west half, but they did not do so. That is their right still; as soon as the amount due to the plaintiff is ascertained in the Master's office, they can require her to accept payment, and can then take her place, and at their own expense have recourse to the west half. But they have no right to involve her in the expense of construing the testator's will, and of ascertaining what rights of the debtor in the west half are subject to the charge. If they do not choose to do that, I think the plaintiff must be allowed to proceed with her action just as if there was no

question about the west half at all: see *Wallis v. Woodyear*, 2 Jur. N. S. 179.

For these reasons, I think the appeal should be allowed and that the order should be discharged with costs both of the appeal and the motion in the Court below.

HAGARTY, C.J.O., and BURTON and OSLER, JJ.A., concurred.

STARK ET AL. V. ROSS.

Receiver—Ex Parte Order—Costs—Review.

After judgment a receiver may be appointed *ex parte* in case of emergency or where there is danger apprehended in the disposal of property.

Re Potts, [1893] 1 Q. B. at p. 662, and *Minter v. Kent, etc., Land Society*, 11 Times L. R. 197, referred to.

And where *ex parte* orders were made in respect of two parcels of stock which the plaintiff feared might be disposed of if notice were given, and in both cases costs were given to the applicant:—

Held, that the disposition of the costs should not be reviewed on motion to continue the receiver.

McLean v. Allen, 14 P. R. 84, distinguished.

[June 25, 1896.—*Boyd, C.*]

MOTION by the plaintiffs (judgment creditors of the defendant) for an order continuing the appointment, by two orders of ROSE, J., made *ex parte*, of John Stark as receiver, without security, to collect, get in, and receive any money coming to the defendant from or in respect of any interest of the defendant in all shares of stock in the Manitoba Waggon and Cartage Company, formerly belonging to and standing in the name of the defendant, but assigned or transferred to other persons. In both of the *ex parte* orders costs were given to the plaintiffs.

The motion was argued before BOYD, C., in Court, on 18th June, 1896.

Moss, Q. C., for the plaintiffs, submitted to the Court

dealing with the *ex parte* orders as the Judge who made them might do.

Langton, Q. C., for the defendant, contended that costs should not be allowed to the plaintiffs.

An order was made continuing the receiver, but judgment was reserved as to the question of costs, and was delivered on the 25th June, 1896.

BOYD, C.—After judgment, there is no doubt that a receiver may be appointed *ex parte* in case of emergency, or where there is danger apprehended in the disposal of property: *Re Potts*, [1893] 1 Q. B. 648 at 662; *Minter v. Kent, etc., Land Society*, 11 Times L. R. 197. In this case the *ex parte* orders were made by my brother Rose in respect of two parcels of stock which the plaintiff feared might be disposed of if notice had been given. The plaintiff did not know about the second parcel till after he moved as to the first, and in both cases costs were given to the applicants.

I do not think I am in a position to review these directions as to costs, notwithstanding what was done in *McLean v. Allen*, 14 P. R. 84, which was a different case as to property and circumstances.

I have conferred with my brother Rose, and he concurs in the result.

WILSON V. MANES.

Security for Costs—Appeal to Divisional Court—Judgment at Trial—Rule 1487 (803).

The words "appeal from a single Judge" in Rule 1487 (803) mean from a Judge presiding in Court; that Rule does not interfere with the right to appeal from the judgment of the trial Judge to a Divisional Court; and a party has still the right to prosecute such an appeal without terms being imposed as to giving security for costs.

Seemle, that security should not be "specially ordered" under Rule 1487 (803), upon an appeal by the defendant, where substantial questions arise and the action is of a penal character.

[June 15, 1896.—*Boyd, C.*]

MOTION by the plaintiff for an order requiring the defendant to give security for the costs of the defendant's pending appeal to a Divisional Court from the judgment of ARMOUR, C.J., the trial Judge, in favour of the plaintiff, in an action to recover a penalty.

By Rule 1487, Rule 803 is repealed, and the following substituted:—

803. On any appeal to the Court of Appeal, or any appeal from a single Judge or from a County Court or County Court Judge to a Divisional Court of the High Court, no security shall be required for costs or damages, unless such security is specially ordered by the Court to which the appeal is made or a Judge thereof.

The motion was argued before BOYD, C., in Chambers, on the 15th June, 1896.

Aylesworth, Q.C., for the plaintiff.

W. E. Middleton, for the defendant.

Judgment was delivered on the same day.

BOYD, C.—The appellant has the right to prosecute an appeal to the Divisional Court without terms being imposed as to giving security for costs. This was the invariable rule in case of trial before a Judge or jury, and the provisions of Rule 1487 are not here applicable. I agree with

the respondent's contention that the words "appeal from a single Judge" mean from a Judge presiding in Court, and not one at the trial of a cause. The Rule is directed to cases in which, but for the Rule, the sole right of appeal would be to the Court of Appeal, but by the Rule a new right of appeal is given to the Divisional Court as of concurrent appellate jurisdiction. In appeals of that sort the Court may require security to be given, but there is no intention to fetter or interfere with the previous and still existing right to appeal from the trial Judge to the Divisional Court.

On the merits, I should not be disposed to say that security should be given, as substantial questions arise, and the action is of a penal character.

No order except that costs be in the cause to the defendant.

MOONEY ET AL. V. JOYCE ET AL.

Parties—Causes of Action—Joinder—Rule 300.

Two plaintiffs joined in an action a claim by one for damages for the wrongful interference of the defendants with him in the completion of a building and for assaulting and arresting his servant and co-plaintiff, and a claim by the other for damages for the same assault and arrest:—*Held*, that each was a separate and distinct cause of action, and could not properly be joined, under Rule 300.

Smurthwaite v. Hannay, [1894] A. C. 494, and *Carter v. Rigby*, [1896] 2 Q. B. 113, followed.

Booth v. Briscoe, 2 Q. B. D. 496, distinguished.

[September 8, 1896.—*Meredith*, C. J.]

AN appeal by the defendants from an order of one of the local Judges at Sandwich dismissing an application by the defendants for an order staying proceedings until the plaintiffs should have elected for which of the causes of action sued on they would proceed. The facts appear in the judgment.

The appeal was argued before MEREDITH, C. J., in Chambers, on the 14th July, 1896.

Aylesworth, Q. C., for the defendants.

L. G. McCarthy, for the plaintiffs.

Judgment was delivered on the 8th September, 1896.

MEREDITH, C. J.—The plaintiffs have joined separate causes of action; Harmon for the wrongful interference of the defendants with him in the completion of a building which he was erecting for the St. Andrew's Presbyterian church at Windsor, under a contract with the building committee of the church, and for assaulting and arresting his co-plaintiff Mooney, his servant, who was engaged in doing the work, and he claims for these alleged wrongs \$500 damages; and Mooney sues for the same assault and arrest, and claims \$2,000 damages.

Although each of the causes of action arise, in part at all events, out of the same alleged wrongful acts of the

defendants, each is a separate and distinct cause of action, and the cases of *Sandes v. Wildsmith*, [1893] 1 Q. B. 771; *Smurthwaite v. Hannay*, [1894] A. C. 494; *P. & O. Co. v. Tsune Kijima*, [1895] A. C. 661; *Sadler v. G. W. R. Co.*, [1895] 2 Q. B. 688; *Carter v. Rigby*, [1896] 2 Q. B. 113; and *Bennetts v. McIlwraith*, 12 Times L. R. 616, shew that they cannot properly be joined in one action under Con. Rule 300.*

The effect of the decision in *Smurthwaite v. Hannay* is, as put by Lord Justice Rigby in *Sadler v. G. W. R. Co.*, at p. 696, that you cannot bring plaintiffs before the Court where the causes of action vested in the different plaintiffs are separate.

Mr. McCarthy endeavoured to distinguish these cases, on the ground that, as he urged, in them the same wrongful act was not, as it is in this case, the ground of the action of both plaintiffs; but in *Carter v. Rigby* the claim of each of the plaintiffs was based upon the same act of negligence of the defendants, and Lord Esher said, at p. 119, referring to *Smurthwaite v. Hannay*, "The interpretation, therefore, that we must put on this latter rule" (the counterpart of our Rule 300) "is that it does not authorize the joinder of the plaintiffs in this action, although the matter which is alleged against the defendants, and which gave rise to all the actions, was the same in each case."

Booth v. Briscoe, 2 Q. B. D. 496, relied on by Mr. McCarthy, if still an authority, is distinguishable for the reasons pointed out by Lord Russell in *Smurthwaite v. Hannay*, at p. 506.

The appeal must therefore be allowed, and an order made that the plaintiffs do elect within two weeks which plaintiff's claim will be proceeded with in this action, and do within the same period amend the writ and statement

*All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And, without any amendment, judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to.

of claim by striking out all parts that refer to the claim of the other plaintiff, and that in default the action be dismissed with costs.

The costs of the application to the local Judge and of the appeal will be costs in the cause to the defendants in any event.

CAMPAU V. RANDALL.

Summary Judgment—Rule 739—Special Appearance—Defence of Want of Jurisdiction—Judicature Act, 1895, sec. 124—Absence of Defence on the Merits.

Action upon a foreign judgment. Both plaintiff and defendant resided out of the jurisdiction; neither of them was a British subject; and the cause of action upon which the judgment was recovered arose out of Ontario. The plaintiff's right, if any, to sue in this Province depended upon sec. 124 of the Judicature Act, 1895. The defendant entered a special appearance, and raised, by pleading, the question of jurisdiction.

Upon an appeal from an order affirming an order refusing summary judgment under Rule 739:—

Held, that, although the defendant failed to shew that he had a good defence to the action on the merits, and disclosed no facts that would have entitled him to defend in an ordinary action, yet the discretion exercised below should not be interfered with, having regard to the special nature of the jurisdiction conferred by sec. 124, and the provision requiring, even where no appearance is entered, the plaintiff's claim to be proved before he obtains judgment.

[September 15, 1896.—*Divisional Court.*]

APPEAL by the plaintiff from an order of ARMOUR, C. J., in Chambers, affirming an order of one of the local Judges at Sandwich dismissing the plaintiff's application for summary judgment under Rule 739, in an action upon a foreign judgment. The facts are stated in the judgment.

The appeal was argued before a Divisional Court composed of MEREDITH, C. J., and ROSE, J., on the 8th June, 1896.

J. B. Clarke, Q.C., for the plaintiff.

L. G. McCarthy, for the defendant.

Judgment was delivered on the 15th September, 1896.

MEREDITH, C. J.—The plaintiff sues upon a judgment recovered by him against the defendant in the Justice's Court at Detroit. Both plaintiff and defendant reside in Detroit; neither of them is a British subject; and the cause of action upon which the judgment was recovered arose out of Ontario.

The plaintiff's right to sue in this Province, if he have any right to do so, depends upon sec. 124 of the Judicature Act, 1895.

According to the provisions of that section,* if the defendant had not appeared, it would have been necessary for the plaintiff "before obtaining judgment to prove his claim and the amount of debt or damages claimed by him in the action, either before a Judge or jury upon an assessment in the usual mode, or in such other mode, having regard to the nature of the case, as the Judge" might "direct."

The defendant has filed a conditional appearance or appearance under protest, and is therefore entitled to raise by pleading, as he has done, the question of jurisdiction: *Howland v. Insurance Company of North America*, 16 P. R. 514.

Having regard to the special nature of the jurisdiction which is conferred by sec. 124, and the provision requiring, even where no appearance is entered, the plaintiff's claim to be proved before he obtains judgment, I do not think that we ought to interfere with the discretion exercised by the local Judge and the Chief Justice in refusing to allow the plaintiff to enter judgment under Rule 739,

* 124. Service out of jurisdiction of a writ of summons * * may be allowed by the Court or a Judge where the action is not for any matter within any of the classes for which service out of the jurisdiction is now provided, but it appears to the satisfaction of the Court or Judge that the plaintiff has a good cause of action against the defendant upon a contract or judgment and that the defendant has assets in Ontario of the value of \$200 at least, which may be rendered liable to the judgment in case the plaintiff should recover judgment in the action; and if the

although in an ordinary case I think the plaintiff would, on the material before us, have been entitled to the order. He has verified by affidavit, as well as by the exemplification of the judgment on which he sues, his cause of action, and states that, in his belief, there is no defence to the action, and the defendant has not denied the recovery of the judgment or his indebtedness to the plaintiff, and though he has set up the want of jurisdiction, he has not denied that "he has assets in Ontario of the value of \$200 at least, which may be rendered liable to the judgment in case the plaintiff should recover judgment in the action." So that, in my opinion, he has failed to shew that he has a good defence to the action on the merits, and has not disclosed any facts that would entitle him to defend the action, if, as I have said, it were an ordinary one.

The appeal must therefore be dismissed, and the costs of it will be costs in the cause to the defendant in any event.

ROSE, J.—I do not think we can interfere with the discretion already exercised.

defendant does not appear the Court or a Judge is to give any directions which the Court or Judge from time to time sees fit as to the manner of proceeding in the action and the conditions on which the same may be proceeded with, and shall require the plaintiff before obtaining judgment to prove his claim and the amount of debt or damages claimed by him in the action, either before a Judge or jury upon an assessment in the usual mode, or in such other mode, having regard to the nature of the case, as the Court or Judge may direct.

DAVIDSON ET AL. V. FRASER ET AL.

Appeal Bond—Supreme Court of Canada—Condition.

The condition in a bond filed upon an appeal to the Supreme Court of Canada was to "pay such costs and damages as shall be awarded *in case the judgment shall be affirmed*:"—

Held, that this was not in substance the same as the statutory condition to "pay such costs and damages as may be awarded against the appellant by the Supreme Court;" and the italicized words added a condition not required by the Supreme Court Act, and by which the respondents ought not to be hampered.

[July 11, 1896.—*Osler, J.A.*]

MOTION by the defendants to allow their appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, 23 A. R. 439, in favour of the plaintiffs.

The motion was argued before OSLER, J.A., in Chambers, on the 11th July, 1896.

J. Grayson Smith, for the defendants.

G. G. Mills, for the plaintiffs, objected to the form of the bond filed by the defendants as security upon the appeal.

Judgment was delivered on the same day.

OSLER, J. A.—On further consideration, I think I must hold that the bond proposed is defective in form, and cannot be allowed. The condition should be that which the 46th section of the Supreme Court Act requires, viz., "pay such costs and damages as may be awarded against the appellant by the Supreme Court." I cannot say that a condition to "pay such costs and damages as shall be awarded *in case the judgment shall be affirmed*" is in substance the same as the statutory condition. It does not even say "affirmed or in part affirmed," which might meet the case of a variation of the judgment below.

But the real difficulty is that the bond adds a condition which the present Supreme Court Act (differing in

this respect from the former enactment) has not thought fit to require. The condition ought to be to pay such costs, etc., as the Supreme Court may award against the appellant. This bond limits the liability to such costs as may be awarded in the event of that Court affirming the judgment, and I think Mr. Mills is right in saying that the respondents ought not to be hampered by such a condition.

The bond must therefore be disallowed, but I shall extend the time for putting in another for a fortnight from this date (11th July). The respondent will be able in the meantime to satisfy himself of the sufficiency of the sureties, or one of them, in case the same should be offered again.

RE MOLPHY, BECKES V. TIERNAN.

Appeal—Master's Certificate—Divisional Court.

An appeal does not lie to a Divisional Court from the decision of a Judge in Court upon an appeal from a Master's report.

The certificate of a Master is a report, and is subject to the same rules as to appeal as an ordinary report.

[September 1, 1896.—*Divisional Court.*]

AN appeal by Elizabeth Molphy, a legatee, from an order of ROSE, J., in Court, dismissing her appeal from a certificate of the local Master at Woodstock in a proceeding for the administration of the estate of one Molphy, deceased.

The appeal was heard by a Divisional Court composed of ARMOUR, C.J., and FALCONBRIDGE and STREET, JJ., on the 27th and 28th May, 1896, upon the merits and upon a preliminary objection raised by the respondents, the executors, that no appeal lay.

F. A. Anglin, for the respondents, upon the preliminary objection. A Divisional Court has no jurisdiction to entertain this appeal. By sec. 2 of the Law Courts Act,

1895, 58 Vict. ch. 13 (O.), "there shall not be more than one appeal in this Province from any judgment or order * * save in certain * * cases hereinafter specified," and this is not one of the excepted cases. By sec. 71 (2) of the Judicature Act, 1895, 58 Vict. ch. 12, an appeal lay direct to a Divisional Court from the certificates or reports of Masters; but this has been repealed by sec. 3 of the Law Courts Act, 1896, and appeals "shall be prosecuted in such cases in the manner provided in respect to such cases before the passing of the said Act" (Judicature Act, 1895). Before the passing of the Judicature Act, 1895, an appeal from a Master's report or certificate lay to a Judge in Court, and thence to the Court of Appeal. There was no appeal to a Divisional Court, either in the first instance or on appeal from the order of a Judge in Court. Though the corresponding section of the Law Courts Act, 1895, sec. 11 (2), is not expressly repealed, it must be taken to be so by implication.

E. R. Cameron, for the appellant. By sec. 71 (3) of the Judicature Act, 1895, and sec. 11 (3) of the Law Courts Act, 1895, which are not repealed, an appeal lies to a Divisional Court from any judgment or order of a Judge of the High Court in Court.

On the 1st September, 1896, the judgment of the Court : was delivered by

STREET, J.—Prior to the passing of the Judicature Act, 1895, appeals from Masters' reports were heard before a Judge in Court: Con. Rule 850.

The certificate of a Master of any determination by him of a matter arising upon a reference, over which he has jurisdiction, is a report upon the matter, and subject to the same rules as to appeal as an ordinary report: *Chennell v. Martin*, 4 Sim. 340. They are coupled together in sub-sec. 2 of sec. 71 of the Judicature Act of 1895.

An application was made by the present appellant, Elizabeth Molphy, to the Master to take the conduct of

the reference from the executors and give it to the appellant. The Master refused the application, and the appellant appealed to Rose, J., in Court on 14th May, 1896, against the Master's decision as set forth in his certificate.

The appeal was dismissed, and the appellant now appeals to the Divisional Court.

By sec. 3 of ch. 18 of the Ontario Statutes for 1896, the practice prevailing before the passing of the Judicature Act, 1895, with regard to appeals from the certificates and reports of Masters was restored; and the present appeal is clearly governed by the Act of 1896, or, in other words, by the former practice.

I can find no warrant, either in the present or in any former practice, justifying an appeal to the Divisional Court from the decision of a Judge in Court upon an appeal from a Master's report; and I think that this appeal should be quashed with costs, upon the ground that no appeal lies to us.

BANK OF TORONTO V. KEILTY.

Summary Judgment—Rule 739—Defence—Disclosure of Facts—Appeal—Judge in Chambers—Divisional Court.

In answer to a motion by the plaintiffs for summary judgment under Rule 739 in an action upon a promissory note made by the defendant in favour of a trading company and indorsed by them to the plaintiffs, whose manager swore that they were the holders thereof in due course for value, the defendant made an affidavit in which he stated that he had never received any consideration for the note; that he made it for the accommodation of the company; that he had heard the local manager of the plaintiffs say that the note was not discounted by them, but was simply left with them; that he believed the local manager was aware when he received the note that it was an accommodation one, and was also aware of the arrangement entered into between the company and the defendant at the time the note was made; and that an accountant placed by the plaintiffs in charge of the books of the company was present when that arrangement was made. He did not state that the local manager had the requisite notice to affect the plaintiffs, nor the grounds of his belief that he had such notice; nor did he state that the accountant referred to had any notice or knowledge of the agreement referred to; nor did he adduce any hearsay evidence in support of the defence attempted to be set up:—

Held, that the defendant had not shewn satisfactorily that he had a good defence on the merits, nor disclosed such facts as should be deemed sufficient to entitle him to defend.

An order of a Judge in Chambers, made upon appeal from an order of the Master in Chambers, allowing summary judgment under Rule 739 to be entered, is an interlocutory order, but an appeal lies from it to a Divisional Court.

[June 24, 1896.—*Divisional Court.*]

AN appeal by the defendant from an order of STREET, J., in Chambers, allowing an appeal from an order of the Master in Chambers dismissing the plaintiffs' motion for summary judgment under Rule 739, and allowing the plaintiffs to enter judgment under that Rule for the amount of their claim, including interest and costs, as shewn by the indorsement upon the writ of summons.

The plaintiffs' claim was upon a promissory note for \$10,000, dated 19th September, 1893, at three months, made by the defendant to the Toronto Wood and Shingle Company, and indorsed to the plaintiffs. They claimed interest thereon to the amount of \$1,129.58, and allowed a credit of \$3,000 "on account of principal of said note, as per agreement dated the 14th December, 1894," thus claiming in all \$8,129.58.

Mr. Coulson, the plaintiffs' general manager, made an affidavit in support of the original motion, in which he verified the cause of action, and stated that the plaintiffs received the note very shortly after its date and prior to maturity, in the ordinary course of banking business, and that the plaintiffs were now the holders thereof in due course for value ; that an order was made for the winding-up of the Toronto Wood and Shingle Company in the early part of November, 1893 ; that, subsequently to the making of such order, the deponent had an interview with the defendant, at which he admitted his liability upon the note, and requested the deponent to make an allowance to him from the total amount of the note, in view of certain facts which he represented in connection with his dealings with the Toronto Wood and Shingle Company ; that, although the plaintiffs had no connection with such dealings, and were in no way called upon to make any allowance to the defendant, yet, in view of all the circumstances, and in consideration of his representations as to his financial condition, the deponent at such interview agreed to make him an allowance of \$2,000 from the total ; that at a subsequent interview, at which Mr. Henderson, the plaintiffs' inspector, was present, the defendant asked for a further reduction, and again admitted his liability upon the note, and the deponent then agreed to make him an allowance of \$3,000 ; that the defendant was justly and truly indebted to the plaintiff in \$8,129.58 ; that in the deponent's belief there was no defence to the action, etc.

This affidavit was corroborated by that of Mr. Henderson.

An affidavit of one of the solicitors for the plaintiffs was also filed, in which he stated that he acted as solicitor for the plaintiffs in the matter of the winding-up of the Toronto Wood and Shingle Company ; that in the course of the winding-up proceedings the deponent had interviews with the defendant in which the note now sued on was referred to, and the defendant admitted his liability thereon ; and

exhibited to this affidavit were an affidavit sworn to by the defendant for use in the winding-up proceedings, and a copy of an agreement executed by the defendant, bearing date the 14th December, 1894.

The affidavit of the defendant in the winding-up proceedings was made on the 14th December, 1894, and stated that he purchased the mill property for \$10,000, and gave his promissory note for that sum, which note was held by the Bank of Toronto, and was a charge against him to the extent of \$7,000; that the bank had pressed him for payment, whereupon he entered into negotiations with them, and pointed out the loss he had sustained, and they agreed to accept \$7,000 instead of \$10,000, and he promised to give them the security of the mill property for such note.

By the instrument of the 14th December, 1894, the defendant transferred to the plaintiffs all his right, title, and interest in the mill property, subject to the provision that he should be entitled to a re-transfer when he should "redeem" the note.

The defendant filed an affidavit in answer, in which he stated that he had never received any consideration for the note; that at the time it was given the firm of Kieran & McAdam, who were succeeded by the Toronto Wood and Shingle Company, owed him \$3,000, which the company agreed to pay him, and the company owed him, besides, \$1,500, and it was agreed between him and the company that these two sums, amounting to \$4,500, should be applied as part payment of the purchase money of a mill, etc., purchased by him from the company, on or about the 19th September, 1893, which would leave \$2,500 to be paid to the company as the balance of the purchase money, for, although the consideration for the purchase was mentioned as \$10,000, the real consideration was \$7,000, and at the time of the purchase the company requested him to accommodate them by giving them a note for \$10,000, which he did, and which was purely an accommodation note, with the exception of \$2,500, part thereof; that the company,

the deponent believed, handed the note to the Bank of Toronto, King street west branch, and he had heard the manager thereof, Mr. Bird, say that the note was not discounted by the bank, but was simply left with them; that he verily believed that Mr. Bird was fully aware that the note was given by him (the defendant) as an accommodation note, and he (the defendant) understood and verily believed that Mr. Bird was fully aware, at the time he received the note, of the arrangement that was entered into between the company and him (the defendant) on or about the 19th September, 1893; that under the purchase all the property was to be given to him by the company free of incumbrance, but after he entered into possession, he found that it was heavily incumbered, and, before he could get full possession and ownership thereof, he had to pay about \$3,000, which he would be entitled to deduct from the purchase money, and receive from the company about \$500; that during the summer of 1892, and for some weeks prior to the month of September, 1893, and down until the time of the order for the liquidation of the Toronto Wood and Shingle Company, in November, 1893, the plaintiffs placed one Rutherford, an accountant, in charge of the books of the company at their offices, for the purpose of having him report, from time to time, to the plaintiffs, the condition of the company's affairs, and Rutherford was present in the offices of the company when the agreement of September, 1893, was being entered into, and he (the defendant) was not aware for some months afterwards that Rutherford had been placed in charge of the company's books by the plaintiffs; and that he (the defendant) had a good defence to the action on the merits.

Affidavits in reply were filed by the plaintiffs denying many of the matters alleged by the defendant.

The appeal was argued before a Divisional Court composed of BOYD, C., and FERGUSON and ROBERTSON, JJ., on the 20th May, 1896.

F. Denton, for the defendant.

W. R. Riddell, for the plaintiffs, objected that no appeal lay to a Divisional Court, and opposed the appeal on the merits.

Judgment was delivered on the 24th June, 1896.

BOYD, C.—I would affirm the order of Mr. Justice Street. I think the affidavit of the defendant is not satisfactory in shewing any reasonable grounds of defence. It is more than met or overbalanced by his prior affidavit of the 14th December, 1894, which has not been explained or minimized by him. The theory that the transaction relied on by the defendant was known to Rutherford, and so made known to the bank, is not the proper deduction from the allusive phrases of the last paragraph of the defendant's affidavit. His statement that he believes the whole matter was known to Mr. Bird is objectionable as not shewing the grounds of belief, and it is negatived by Mr. Bird—if that is needful. Altogether I see no sufficient reason for overruling Mr. Justice Street's conclusion on these materials.

FERGUSON, J.—This is an appeal from an order made by Mr. Justice Street in Chambers, whereby it was ordered that the plaintiffs should be at liberty to enter final judgment against the defendant for the amount of their claim as shewn by the indorsement on the writ of summons, with interest and costs. The order was made under the provisions of Rule 739.

The action is upon a promissory note made by the defendant. It clearly appears, as I think, from the evidence, that the plaintiffs received and became the holders of this note in due course of business, and for value, and that they the plaintiffs, are entitled to the judgment unless the defendant has, by affidavit or otherwise, shewn satisfactorily that he has a good defence on the merits, or has disclosed such facts as should be deemed sufficient to entitle him to defend the action.

After a perusal of all the evidence and material brought before us, I am clearly of the opinion that the defendant has not shewn that he has a good defence.

Then as to the disclosure of facts to entitle him to defend the action. The defendant by his affidavit discloses some facts that took place between him and other persons, which cannot be of any importance here unless notice of them is brought home to the plaintiffs at or before the time they received the note sued on. And what the defendant says on this subject is that he believes Bird, the plaintiffs' local manager, had notice at the time he received the note, and that the plaintiffs had placed one Rutherford in charge of the books of the Toronto Wood and Shingle Company (they being the parties to whom the note was given by the defendant) for the purpose of having him report from time to time to them (the plaintiffs) as to the condition of the affairs of that company, and that Rutherford was in the office of the company when a certain agreement, more or less relied on, was made. He does not state that Bird had the requisite notice, or even the reasons or grounds of his belief that he had such notice; nor does he state that Rutherford had any notice or knowledge of the agreement to which he alludes; and it seems to me that the defence proposed by the defendant is not founded upon any known facts, but is mere guess work or conjecture. There does not appear to be even hearsay evidence in support of it. In this respect I think the case falls under the decision in *Merchants' National Bank of Chicago v. Ontario Coal Co.*, 16 P. R. 87.

I am of the opinion that the order appealed from is right and should be affirmed with costs.

There was a preliminary objection on the ground that the appeal did not lie, because the order appealed from is an interlocutory and not a final order. That the order is interlocutory and not final is, as I think, clearly shewn by the case *Standard Discount Co. v. LaGrange*, 3 C. P. D. 67. This alone is not, however, as I think, a reason sufficient for saying that the appeal does not lie. It must also

appear that prior to the Judicature Act, 1881, there would have been no relief from a like order by an application to a superior Court. The effect of recent legislation upon the subject seems to throw the matter back to be governed by the provisions of secs. 69 and 68 of that Act.

Before the passing of the Judicature Act of 1881, a party dissatisfied with a Judge's order might in general apply to the Court to have it set aside. In the 12th edition of Archbold's Practice, at pp. 1608 and 1609, this subject is more or less discussed, and many authorities referred to. I am of the opinion that before the passing of the Judicature Act of 1881 relief could be had in respect of an order of the character of the one in question here by an application to a superior Court.

A case such as the present one seems to fall under the saving provision of the last line of sec. 70 of the Judicature Act of 1895, which section provides for no more than one appeal, etc., etc.

ROBERTSON, J., concurred.

Appeal dismissed with costs.

BOSWELL V. PIPER ET AL.

Attachment of Debts—Rule 935—Garnishee “within Ontario”—Foreign Insurance Company—55 Vict. ch. 39, secs. 14, 17.

The garnishees, an English insurance company, had an agent or attorney and a chief agency in Ontario, and service of process could be made upon such attorney for the purposes mentioned in secs. 14 and 17 of 55 Vict. ch 39, the Ontario Insurance Corporations Act :—

Held, that the garnishees were not “within Ontario,” within the meaning of Rule 935.

Canada Cotton Co. v. Parmalee, 13 P. R. 308, followed.

County of Wentworth v. Smith, 15 P. R. 372, distinguished.

[May 5, 1896.—*The Master in Chambers.*]

[May 21, 1896.—*Rose, J.*]

[June 30, 1896.—*Divisional Court.*]

MOTION by the plaintiff (judgment creditor) for an order absolute for payment over by the Imperial Insurance Company of London (Limited) of moneys attached in their hands as due to the defendants (judgment debtors) under an insurance policy.

The motion was argued before the Master in Chambers on the 4th May, 1896.

G. L. Lennox, for the plaintiff.

W. Gow, for the garnishees.

S. W. McKeown, for the claimant Harthill.

W. N. Tilley, for the claimant Carruthers.

Judgment was delivered on the following day. .

THE MASTER IN CHAMBERS.—It is contended on behalf of the garnishees that there is no jurisdiction to make the order, in consequence of the garnishees being a foreign corporation and not “within Ontario,” as required by Rule 935.

It appears that the garnishees are a company licensed by the Government of Ontario to do business within Ontario under the provisions of the Insurance Corporations Act, 1892, 55 Vict. ch. 39 (O.)

In my opinion, the case of *County of Wentworth v. Smith*, 15 P. R. 372, applies and is to be followed.

As to there being a joint debt, that is put beyond dispute by the affidavits of the claimants. Mrs. Carruthers, it is admitted, is entitled to \$600 and interest. The balance is claimed by one Alexander Harthill.

There will be an issue between the judgment creditor and claimant. The amount due Mrs. Carruthers will be paid over to her, including her costs of this application.

The claimant Harthill appealed from the Master's order, and his appeal was argued by the same counsel before ROSE, J., in Chambers, on the 15th May, 1896.

Judgment was delivered on the 21st May, 1896.

ROSE, J.—Having regard to the decisions of the Court both prior and subsequent to *County of Wentworth v. Smith*, 15 P. R. 372, i.e., *Bank of British North America v. Laughrey*, 2 U. C. L. J. N. S. 44, and *Parker v. Odette*, 16 P. R. 69, I cannot agree that the learned Chancellor in *County of Wentworth v. Smith* intended to lay down any doctrine inconsistent with that found in the other cases.

In both *Bank of British North America v. Laughrey*, and *Canada Cotton Co. v. Parmalee*, 13 P. R. 308, it was held that a foreign corporation was not within Ontario, although doing business through agents in Ontario.

Under the 23rd Vict. ch. 33, sec. 5, as well as under the 55th Vict. ch. 39, sec. 14, a foreign company obtaining a license was required to appoint an agent by power of attorney within the Province, and in each case a license was requisite to enable the company to transact business within the Province.

I think the case is governed by authority, and the appeal must be allowed with costs.

The plaintiff appealed from the order of ROSE, J., and his appeal was argued before a Divisional Court composed of FERGUSON and ROBERTSON, JJ., on the 29th June, 1896.

G. L. Lennox, for the plaintiff.

S. W. McKeown, for the claimant Harthill.

W. Gow, for the garnishees.

The following cases, in addition to those referred to in the judgments, were cited in argument: *Carron Iron Co. v. Maclaren*, 5 H. L. C. 416; *Lundy v. Dickson*, 6 U. C. L. J. O. S. 92; *Ingate v. Lloyd*, 4 C. B. N. S. 704, 709; *Haggin v. Comptoir d'Escompte de Paris*, 23 Q. B. D. 519.

Judgment was delivered on the following day.

FERGUSON, J.—I have examined all the cases referred to in the argument, as well as the cases mentioned in those decisions, and also the Acts of Parliament relied on, and I am of opinion that the order appealed from is right and should be affirmed.

I think the decision in the case *Canada Cotton Co. v. Parmalee*, 13 P. R. 308, which is a decision of the Common Pleas Division, should be followed by this Court; and I think the case *County of Wentworth v. Smith*, 15 P. R. 372, distinguishable from the present case. See the concluding paragraph of the Chancellor's judgment therein.

It was contended that the Act 55 Vict. ch. 39, secs. 14 and 17 (an Act of the Province of Ontario), passed after the decision in *Canada Cotton Co. v. Parmalee*, so changed the law on the subject that that decision is not to be relied on. Counsel said that his sole reliance was upon the passing of this Act, and the garnishees, the insurance company, having (as is shewn by the evidence) availed themselves of the provisions of it. I am, however, of the opinion that all that has (so far as this case has concern) been made to appear by these means is that these garnishees have an agent or attorney and a "chief agency" in this Province, and that service of process may be made upon such attorney for the purposes mentioned or referred to in sub-sec. 2 of sec. 14 and sec. 17 of that Act, which are, as I think, widely different from the matters arising here. I am unable to see that the facts of having an attorney and a "chief agency" in this Province, as required by and for

the purposes of the provisions of that Act of the Legislature, enables me to say that this insurance company (an English corporation) "is within Ontario," as required by Rule 935 of the Consolidated Rules, and, unless this can properly be said, the change in the law, since the decision in *Canada Cotton Co. v. Parmalee*, contended for, does not seem to have taken place. I think that case should be followed, with the effect of dismissing this appeal and affirming the order of my brother Rose, and I suppose the costs should follow.

ROBERTSON, J., concurred.

CLARK V. VIRGO ET AL.

Costs—Taxation—Two Defendants Appearing by Same Solicitor—Appeal—Extension of Time—Solicitor's Mistake—Objections to Taxation—Question of Principle—Rules 1230, 1231.

An action against two defendants, who defended by the same solicitor, was dismissed as against one with costs, and judgment was given for the plaintiff against the other with costs:—

Held, that the successful defendant should on taxation be allowed the costs of services (if any) appertaining wholly to his own defence, and at most only a proportionate part of the costs of services appertaining to both defences, as in *Heighington v. Grant*, 1 Beav. 228.

Time for appealing from taxation extended, as a matter of discretion, where, by the mistake of the solicitor, the appeal was at first brought on in due time in the wrong forum, and after that, but too late, in the proper forum.

Where the principle on which the taxing officer acts is objected to, that is to say, his mode or method of proceeding in taxing the bill, it is not necessary for the party proposing to appeal to carry in written objections before the officer, as provided for by Rule 1230, to enable him to review his taxation, under Rule 1231.

[September 14, 1896.—*Ferguson, J.*]

AN appeal by the plaintiff from the taxation by a local officer of the costs of the defendant Edwin Ellis Virgo of the action.

At the trial FERGUSON, J., gave judgment for the plaintiff against the defendant Kate Irene Virgo for \$270,

with full costs, and dismissed the action as against her husband, the defendant E. E. Virgo, with costs to be paid by the plaintiff.

The defendants defended by the same solicitor.

The local officer allowed the defendant E. E. Virgo a full bill of costs as if he had been the only defendant.

The appeal was taken on the ground that that defendant should be allowed as against the plaintiff full costs only in respect of such services rendered by the common solicitor as appertained to his defence solely, and but half the costs of services common to the defence of both defendants.

The appeal was heard before FERGUSON, J., in Chambers, on the 11th September, 1896.

W. H. P. Clement, for the defendant E. E. Virgo, objected that the appeal did not lie because it was brought too late, and also because objections in writing were not carried in by the appellant before the local officer.

D. L. McCarthy, for the plaintiff, contra.

The appeal was argued on the merits subject to the objections.

Judgment was delivered on the 14th September, 1896.

FERGUSON, J.—The defendants are husband and wife, and they defended by the same solicitor. There was judgment for the plaintiff against the wife for the sum of \$270, with full costs of the action upon the higher scale. The action was dismissed as against the husband with costs. The disposition of the counterclaims is unimportant here.

The taxing officer, in taxing the costs of the defendant the husband against the plaintiff, allowed in his favour the full amount of costs, not only of the charges or items in the bill appertaining solely to the husband's defence, but also of those charges or items which were common to the defence of both defendants, that is, which appertained alike, or equally, or in some degree, to the defence of each of the two defendants.

From this decision or method of taxation the plaintiff appeals. There are two objections to the appeal. One is that the appeal was not brought in proper time, and is too late. An appeal or supposed appeal was brought in proper time before the Master in Chambers, who decided that he had not jurisdiction, and, after that, this appeal. In this way the delay is accounted for. It seems to have been a mistake of the solicitor in respect to the Court to which the appeal rightly lay. I am aware that in some decisions it has been stated that a mistake of a solicitor is not a sufficient reason for enlarging the time for appealing. There is, however, power to do so. It is a matter of discretion. The decisions cannot be said to be uniform. There was here no hesitancy or delay on the part of the appellant, nor any negligence, further than the mere error as to the proper practice, which in some light might perhaps be considered neglect; and, in the circumstances, I think it a proper thing to do so to enlarge the time for appealing as to permit, so far as this objection has concern, this appeal to be heard.

The other objection to the appeal is that objections in writing were not carried in before the taxing officer, as provided for by Rule 1230, to enable him to review and reconsider his taxation, as provided in Rule 1231. I am, however, of the opinion that the provisions of these Rules do not apply to the case. The principle on which the taxing officer acted was objected to; that is to say, his mode or method of proceeding in taxing the bill, as above stated, was objected to by the plaintiff, and this objection was overruled. This objection applied, so far as I understand, equally and alike to each and every item in respect to which the plaintiff is now dissatisfied, and, as I think, need not have been repeated and carried in in writing in respect to each of the numerous items standing in precisely the same position with regard to it. I think the objection is an objection to the principle on which the taxation proceeded, and that, although not like the cases *Re Castle*, 36 Ch. D. 194, or *Sparrow v. Hill*, 7 Q. B. D. 362, 8 Q. B. D.

479, yet, so far as I can see, the same principle should apply.

Then, as to the merits. I am of the opinion that the taxing officer was clearly in error in proceeding with the taxation and taxing the bill as he did. The judgment gave the defendant the husband his costs, that is, his proper costs; and what were his proper costs? Certainly, these did not and do not embrace and comprehend the costs of services performed partly for or in his defence, and partly for or in the defence of his co-defendant, but at most only a proper proportionate share of such costs. See Gray on the Law of Costs, 96 (the immediately subsequent pages might also be looked at). See also *Re Allen, Davies v. Chatwood*, 11 Ch. D. 244, going to shew that the defendants' solicitor could not collect from this defendant the whole of the costs that have been so taxed in his favour against the plaintiff. • The case *Heighington v. Grant*, 1 Beav. 228, indicates the mode of taxation that should be adopted where an apportionment of costs has been directed.

It was not suggested that I should on this appeal really tax the bill myself, and I think a proper course is to refer or send the bill back to the officer who taxed it to be by him again taxed in accordance with the indications above, unless the parties agree that the bill shall instead now be taxed by the taxing officer in Toronto. This defendant, the husband, should, as I think, be allowed on the taxation the costs of services (if any) appertaining wholly to his own defence, and at most only a proper proportionate part of the costs of services appertaining to both defences of the defendants.

Appeal allowed with costs.

RE BRODERICHT V. MERNER.

*Division Courts—Garnishee Plaintiff—Application to Remove into High Court
—Judgment against Primary Debtor only—R. S. O. ch. 51, sec. 79.*

An application under sec. 79 of the Division Courts Act, R. S. O. ch. 51, to remove an action from a Division Court into the High Court will not lie after judgment in the Division Court; and this rule will be applied where the action in the Division Court is brought under sec. 185, the garnishee being a party to the proceedings from the beginning, if final judgment has been obtained against the primary debtor, even though the liability of the garnishee has not been determined.

Gallagher v. Bathie, 2 U. C. L. J. N. S. 73, applied and followed.

[September 15, 1896.—*Ferguson, J.*]

APPLICATION by the plaintiffs in this and four other garnishee complaints in the 4th Division Court in the county of Waterloo for an order removing such complaints into the High Court, and consolidating them into one action.

The application was made under sec. 79 of the Division Courts Act, R. S. O. ch. 51, which is as follows:

“In case the debt or damages claimed in an action brought in a Division Court amounts to \$40 and upwards, and in case it appears to any of the Judges of the High Court that the case is a fit one to be tried in the High Court, and in case a Judge thereof grants leave for that purpose, the action may by writ of *certiorari* be removed from the Division Court into the High Court upon such terms as to payment of costs or other terms as the Judge making the order thinks fit.”

The application was heard by FERGUSON, J., in Chambers, on the 14th September, 1896.

W. M. Douglas, for the plaintiffs

W. H. P. Clement, for the defendant.

Judgment was delivered on the following day.

FERGUSON, J.—This suit and four others are pending in the Division Court. This plaintiff's solicitor is also solicitor for each of the other four plaintiffs, and he moves in this suit for a writ of *certiorari* to have the whole five suits

removed into the High Court and consolidated. The suits in the Division Court were all brought under the provisions of sec. 185 of the Division Courts Act, ch. 51, R. S. O. They are all against the same primary debtor, and in each case the same person is sued and brought in as garnishee. In each case the plaintiff's claim was over \$40, this plaintiff Broderick having, however, a claim much larger than that of any of the other plaintiffs. The five suits were proceeded with in the Division Court so far that judgments were obtained against the primary debtor and as to these judgments there seems to be no contention or dispute. It is said, however, that there are difficulties respecting the position of the garnishee, that is to say, as to whether or not he is indebted to the primary debtor; whether or not he is a trustee of certain money or property for the primary debtor; whether or not he has been fraudulently preferred by the primary debtor, etc.; and it seems that the object of having the suits in the Division Court removed into the High Court is to have these questions or difficulties dealt with and disposed of in the High Court rather than in the Division Court. The motion is sought to be maintained and supported under the provisions of the 79th section of the Division Courts Act above referred to.

The judgments in the Division Court obtained against the primary debtor are final and complete. No assessment or the like is pending or remaining. No question whatever is raised as to the jurisdiction of the Division Court.

In the case *Gallagher v. Bathie*, 2 U. C. L. J. N. S. 73, it seems to be clearly decided by the late Chief Justice Wilson, upon authorities, that a *certiorari* does not in general lie under the provisions of this sec. 79, which was then sec. 61 of the Division Courts Act, after judgment in the Division Court; the learned Judge pointing out that the language of the section indicates that the removal, if it take place at all, should be before trial.

This proposition was not sought to be controverted, but it was contended that, inasmuch as there was not a judg-

ment in the Division Court in respect of the liability or not of the garnishee, and as the suits were brought under the provisions of sec. 185, the garnishee being a party to the proceedings from the beginning, the plaintiffs are in a position to ask and have the *certiorari*.

I was not referred to any provision authorizing the *certiorari* but those of this sec. 79, and I am not aware of any. It was strenuously urged that sec. 79 is applicable to the case thus presented, but, after considering the matter as well as I can, I find myself unable so to apply the words of the section, especially in view of the language employed by the learned Judge in the case above referred to.

I am of the opinion that the motion should be, and it is, refused with costs.

Motion refused with costs.

PIPER ET AL. V. BENJAMIN.

Notice of Trial—Irregularity—Close of Pleadings.

A pleading in reply, which was more than a simple joinder of issue, was served by the plaintiffs on the 30th June, 1896. No further or other pleading having been delivered, and no extension of time for further pleading having been granted, the plaintiffs, on the 4th September, 1896, between three and four in the afternoon, served a notice of trial for the 14th September, 1896 :—
Held, irregular.

[September 18, 1896.—*Ferguson, J.*]

AN appeal by the plaintiffs from an order of the Master in Chambers, dated 10th September, 1896, setting aside a notice of trial served by them.

The action was for trespass to land. The writ of summons was issued on the 29th May, 1896; statement of claim delivered on the 10th June, 1896; statement of defence on the 19th June, 1896; and reply on the 30th June, 1896. By the reply the plaintiffs joined issue on certain paragraphs of the statement of defence, and replied specially as to others.

No further or other pleading having been delivered, and no extension of time having been granted, the plaintiffs, on the 4th September, 1896, between three and four o'clock in the afternoon, served notice of trial for the 14th September, 1896, the first day of the Toronto jury sittings.

Upon the defendant's application, the Master set aside this notice as irregular, holding that the pleadings were not closed when it was served. The plaintiffs appealed from this order, upon the ground that the service of the notice was regular.

The appeal was argued before FERGUSON, J., in Chambers, on the 18th September, 1896.

S. W. McKeown, for the plaintiffs, contended that the pleadings were closed at three o'clock on the 4th September, and the notice, being served after that hour, was regular.

J. B. Holden, for the defendant.

The following Rules were referred to :

654. After the close of the pleadings either party may give notice of trial for the next sitting of the Court which shall be not less than ten days thereafter for the place so named or ordered.

392. As soon as either party has joined issue upon any pleading of the opposite party simply, without adding any further or other pleading thereto, or as soon as the time for amending the pleadings under these Rules or under any order made in the action or for delivering a reply or subsequent pleading has expired, the pleadings as between such parties shall be deemed to be closed without any joinder of issue being pleaded by any or either party.

382. No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a Judge, and then upon such terms as the Court or Judge thinks fit.

383. Subject to the last preceding Rule, every pleading subsequent to reply shall be delivered within 4 days after the delivery of the previous pleading, unless the time is extended by the Court or a Judge.

398. Delivering a statement of claim or defence or other pleading includes filing.

Judgment was delivered at the close of the argument.

FERGUSON, J.—The plaintiffs concede that the defendant had the 4th of September to file and deliver his last pleading, and yet they desire by serving their notice of trial after three o'clock on that day to count the day as one of the ten days for notice of trial against the defendant. Unless that day is counted as one of the ten days for notice of trial, the notice is bad. I think the plaintiffs cannot do as they want, and that the order appealed from is right.

Appeal dismissed with costs.

LOCKARD V. WAUGH ET AL.

Costs—Taxation—Successful Defence Upon One Ground—Costs Relating to Other Grounds.

It was adjudged that the plaintiff should pay to the defendants so much of the costs of the action (upon a building contract), reference, and appeal, as were occasioned by reason of his claiming to be allowed as against the defendants, for extra work, anything in addition to the sums allowed therefor by the architect:—

Held, that in taxing costs under this direction the officer was in error in disallowing to the defendants the costs of witnesses called to shew the value, etc., etc., of the extras that had been disallowed to them by the architect's certificate, which was attacked by the plaintiff. The defendants were not called upon to stand upon a single item of evidence, though in the end it might appear that the item would have been sufficient for their purposes.

[September 18, 1896.—*Ferguson, J.*]

AN appeal by the defendants from the certificate of a local officer at St. Catharines upon the taxation of their costs against the plaintiff, pursuant to judgment.

The action was brought by a sub-contractor against the principal contractors for the erection of a large building, to recover the sub-contract price and a sum for extras. There was also a counterclaim by the defendants against the plaintiff.

An order was made directing that all questions and issues and all questions of amount arising in the action and counterclaim be tried by a local Master. The Master made his report finding a balance of \$1,632.13 due to the plaintiff. The defendants appealed from the report, and their appeal was allowed in part and the amount found due to the plaintiff reduced to \$901.97. Upon motion for judgment upon the report as varied, judgment was entered for the plaintiff for \$901.97, and as to costs it was adjudged that the plaintiff should pay to the defendants so much of the costs of the action and of the reference and appeal as were occasioned by reason of the plaintiff claiming to be allowed as against the defendants, for extra work, anything in addition to the sums allowed therefor by the architect, and by reason of the plaintiff's resisting the claim of the

defendants in respect of certain small items amounting to \$41.53, and that the defendants should pay to the plaintiff the residue of the costs of the action, reference, and appeal.

Upon the taxation of the defendants' costs under this judgment, the local officer disallowed to them items of costs relating to their attempt upon the reference to disprove extras claimed by the plaintiff over and above those allowed by the architect's certificate, holding that, as they succeeded upon appeal by virtue of the architect's certificate, they were not entitled to the costs of resisting upon other grounds the allowance of such items.

The defendants' appeal from the disallowance of these costs was argued before FERGUSON, J., in Chambers, on the 18th September, 1896.

Aylesworth, Q.C., for the defendants.

E. G. Rykert, for the plaintiff.

Judgment was delivered at the close of the argument.

FERGUSON, J.—I am clearly of the opinion that the taxing officer was in error in disallowing to the defendants the costs of witnesses called to shew the value, etc., etc., of the extras that had been disallowed to them by the architect's certificate, which was attacked by the plaintiff. The defendants were not called upon in the litigation to stand upon a single item of evidence, though in the end it may appear that the item would have been sufficient for their purposes. This is a substantial error, as I think, in the taxation, and a ground for referring the taxation now, under Mr. Aylesworth's appeal, for a report.

It may be added that the course pursued by the defendants was in accord with their pleading; they thus indicated to the plaintiff the course they intended to pursue. They followed the record and gave two items of evidence. They could have defeated him with one, but were not called upon to rely upon that. A man may give all his evidence, and he is entitled to have the costs of it allowed.

The opposite party cannot say to him, "you could have succeeded without that witness," etc.

There will then be a reference to the taxing officer (Mr. Thom) to review and examine the taxation of the bill of costs, so far as objected to by the defendants' appeal, and to report thereon.

Order accordingly.

GRAHAM V. TEMPERANCE AND GENERAL LIFE ASSURANCE
COMPANY OF NORTH AMERICA.

Appeal—Court of Appeal—Judgment on Preliminary Issue—Order of Divisional Court—Leave to Appeal—Judicature Act, 1895, secs. 72, 73.

An appeal lies to the Court of Appeal, without leave, from the judgment upon the trial of a preliminary issue directed by an order in Chambers ; but leave is necessary for an appeal from an order of a Divisional Court affirming an order in Chambers, where the appellant is the same party who appealed to the Divisional Court, and the order appealed from was pronounced after, although the appeal was taken and heard before, the coming into force of the Act of 1895.

Construction of secs. 72 and 73 (as amended) of the Judicature Act, 1895.

[October 3, 1896.—*MacLennan*, J.A.]

AFTER the decision of the Queen's Bench Divisional Court in this action reported 16 P. R. 536, upon an appeal by the defendants from an order of ARMOUR, C.J., in Chambers, requiring the defendants to file a better affidavit on production of documents, the defendants applied in Chambers and obtained an order directing a preliminary trial of the question arising as to the right of the plaintiff to require an account from the defendants under the terms of his policy.

This question was then tried before STREET, J., and was decided by him in favour of the plaintiff on the 7th April, 1896.

The plaintiff then applied to the Divisional Court for an order disposing of the appeal from the order of ARMOUR, C.J., which was left undisposed of until after the deter-

mination of the preliminary issue. The Divisional Court, on the 10th September, 1896, made an order dismissing the appeal.

The defendants thereupon appealed to the Court of Appeal from the judgment of STREET, J., upon the preliminary question, and also from the order of the Divisional Court.

The plaintiff moved to quash both appeals, on the ground that they were launched without leave being first obtained.

The defendants opposed the motion on the ground that leave was not necessary, and, in the alternative, moved for leave to appeal and to extend the time therefor, and to validate the proceedings taken.

The appeal to the Divisional Court was taken and heard prior to the coming into force of the Judicature Act, 1895.

Section 72 of the Judicature Act, 1895, is as follows :

Subject to the exceptions and provisions contained in this Act, an appeal shall lie to the Court of Appeal from every judgment, order, or decision of the High Court, whether the judgment, order, or decision was that of a Divisional Court or of a Judge in Court, and including cases tried with a jury where the appellant complains of the judgment and asks in the alternative for a new trial.

Section 73 of the same Act, as amended by the Law Courts Act, 1896, schedule (7) is, so far as material, as follows :

(1) No appeal shall lie from any judgment or order of a Divisional Court, except as hereinafter provided.

(2) In case, after this Act goes into effect, a party appeals to a Divisional Court of the High Court in a case in which an appeal lies to the Court of Appeal, the party so appealing shall not be entitled to afterwards appeal from the said Divisional Court to the Court of Appeal, but any other party to the action or matter may appeal to the Court of Appeal from the judgment or order of the Divisional Court.

(3) Except where an appeal lies under the preceding

clause from a Divisional Court to the Court of Appeal, an appeal to the Court of Appeal shall not lie from a judgment or order of a Divisional Court pronounced on an appeal in a cause or matter in the High Court to such Divisional Court except by special leave first obtained upon an application to such Divisional Court, or to the Court of Appeal or a Judge thereof.

The motions were argued before MACLENNAN, J. A., in Chambers, on the 3rd October, 1896.

C. D. Scott, for the plaintiff.

W. H. Blake, for the defendants.

Judgment was delivered at the close of the argument.

MACLENNAN, J. A.—An appeal lies without leave under section 72 of the Judicature Act, 1895, from the judgment of Mr. Justice Street on the trial of the preliminary issue; but there is no right to appeal without leave from the order of the Divisional Court, notwithstanding that the defendants had appealed to it prior to the coming into force of the Act of 1895. There is now no appeal to the Court of Appeal from a Divisional Court except under sec. 73, and unless a party has a right to appeal without leave under sub-sec. 2 of that section, namely, in a case where another party has appealed to the Divisional Court, it is necessary under sub-sec. 3 to apply for leave.

This is a case, however, in which, under all the circumstances, leave should be granted to the defendants to prosecute their appeals. There should, therefore, be an order allowing them to do so, and dismissing the motion to quash the appeals. Costs in the appeal.

BOURNE ET AL. V. O'DONOHUE.

Appeal—Court of Appeal—Order of Divisional Court Affirming Chambers Orders—Judicature Act, 1895, secs. 72, 73—Leave to Appeal—Special Circumstances—Terms.

An appeal lies to the Court of Appeal from an order of a Divisional Court dismissing an appeal from an order of a Judge in Chambers dismissing an appeal from an order of the Master in Chambers dismissing a motion to set aside judgment by default of defence in an action for the recovery of land ; but only upon leave to appeal being obtained.

Construction of secs. 72 and 73 (as amended) of the Judicature Act, 1895. And leave to appeal was granted, where the omission to file the defence was a mere slip of the solicitor ; the application for relief was made promptly ; and it appeared that in a previous action the Court had stayed proceedings under the power of sale contained in the mortgage upon which this action was brought, and had required an action of ejectment to be brought.

Terms of payment of costs and security for costs imposed.

[October 24, 1896—*MacLennan, J. A.*]

THE defendant brought an action against the plaintiffs to restrain the exercise of a power of sale in a mortgage. Upon motion for an injunction in that action to restrain the sale, on reading affidavits by the plaintiffs and defendant, an order was made staying further proceedings under the power, until after the determination of an action of ejectment, and ordering that the defendants in that action should be at liberty forthwith to bring ejectment to recover possession of the mortgaged lands. Thereupon the present action was brought, and Mr. O'Donohue having entered an appearance, a statement of claim was filed. No defence having been filed within the proper time, the plaintiffs signed judgment. The defendant had given instructions for the filing of a defence, and the omission to file it in time was by mere oversight of his solicitor. A motion was then immediately made to the Master in Chambers, under Rule 796, to set aside the judgment and to be allowed to defend, which was dismissed. An appeal was taken against this order successively to a Judge in Chambers and to a Divisional Court, but without success. The defendant then brought an appeal to this Court, and set it down to be heard.

The present motion was by the plaintiffs to strike the appeal out, on the ground that no appeal lies to this Court, or at all events not without leave, and no leave had been obtained. The defendant made a cross-motion for leave in case it should be necessary.

The motions were argued before MACLENNAN, J. A., in Chambers, on the 17th October, 1896.

Masten, for the plaintiffs.

Meek, for the defendant.

Judgment was delivered on the 24th October, 1896.

MACLENNAN, J. A.—It was contended by Mr. Meek that no leave is necessary, and by Mr. Masten that no appeal lies even with leave.

The question depends on secs. 72 and 73 of the Judicature Act, 1895, amended as to section 73 (3) by 59 Vict. ch. 18, sec. 2, schedule (7). Section 72 gives an appeal to this Court, not merely from decisions of a Divisional Court, but also from decisions of a single Judge in Court. Section 73 (1) then declares that there shall be no appeal from a judgment or order of a Divisional Court, "except as hereinafter provided." Sub-section (2) then deals solely with Divisional Court cases in which there had been an option to appeal either to a Divisional Court or to this Court; and in effect declares that there may be an appeal from a reversing Divisional Court judgment, but not from an affirming one. Then follows sub-sec. (3), which says (as amended) that except where an appeal lies under the preceding clause from a Divisional Court to this Court, an appeal shall not lie without leave. This clause, therefore, is one of the exceptions and provisions mentioned in sec. 72, and also in sub-sec. (1) of sec. 73, and, as I think, plainly authorizes an appeal in the present case, provided leave be obtained, although it is not a case in which there was an option to appeal to this Court in the first instance. All contention that there could be an ap-

peal without obtaining leave is excluded by sub-sec. 1, for by its express terms, there can be no appeal at all, "except as hereinafter provided," that is, unless provided in sub-sec. 3, for it is admitted there is no such provision in sub-sec. 2.

I, therefore, think the defendant had a right to appeal to this Court if he got leave, but not otherwise. It follows that the plaintiffs were right in moving to strike out the appeal. The defendant, however, has now moved for leave.

I have a good deal of hesitation in granting leave in a case in which there have been three judgments already all the same way; and in which the proposed defence appears, to say the least, not to be strong. Upon the whole, I think I ought to grant the leave; and in doing so, I have been influenced by the following considerations. The omission to file the defence, was a mere slip of the solicitor, and the application for relief was made promptly. Moreover, after hearing the parties on the motion for injunction in a previous action by the defendant against the plaintiffs, the Court had stayed proceedings under the power of sale, and had required an ejectment to be brought. That must have been on the ground that the plaintiffs' right to exercise their power was not clear.

It seems to me that, under these circumstances, it is a fair question for this Court whether the defendant should not have been let in to defend under Rule 796 upon the materials before the learned Master.

I think, however, that, under the circumstances, the leave ought only to be granted upon payment of the costs of these motions, which I fix at \$12; and upon a deposit of \$50 by way of security for the costs of the appeal.

RE CANADIAN PACIFIC R. W. CO. AND CARRUTHERS
ET AL.

Interpleader—Bailees—Right to Order—Inability to Deliver Specific Property—Claim for Unliquidated Damages.

Where grain was shipped over a railway under a contract which provided that it might be deposited in the railway company's elevators in common with other grain of like grade, and at its destination was claimed by the indorsee of the bill of lading, and also by an investment company claiming under a mortgage from the shipper, an interpleader order was made, upon the application of the railway company as carriers or bailees, notwithstanding that the specific grain could not be delivered, owing to its having been mixed with other grain in the elevator, as permitted by the contract, and notwithstanding that the investment company's claim was, as contended, one for unliquidated damages for conversion of the grain.

Attenborough v. St. Katharine's Dock Co., 3 C. P. D. 450, followed.

[September 5, 1896—*The Master in Chambers.*]
[September 26, 1896—*Robertson, J.*]

AN application by the Canadian Pacific Railway Company, as carriers or bailees, for an interpleader order respecting a car load of wheat delivered to them at Indian Head, Manitoba, by W. R. Bell, and addressed to the order of La Banque Nationale, to be sent to Fort William, subject to the tariff of the railway company, and under the conditions and contract indorsed on the grain consignment note signed by W. R. Bell.

One of the conditions indorsed was as follows: "2. Any grain consigned to Fort William, where the company have elevators, whether consigned to such elevators or otherwise, may, in the discretion of the company's agent there, be deposited therein, in common with other grain of like grade or quality, as inspected by the official grain inspector, and shall there be subject to the usual elevator charges."

The wheat was received by the railway company on the 22nd November, 1895, and was placed in one of their elevators at Fort William, and mixed with other grain of the same grade.

On the 5th February, 1896, the Scottish American Investment Company (Limited) gave notice to the railway

company that they claimed the wheat as theirs, their claim being under a mortgage from Bell, the shipper.

On the 22nd May, 1896, J. Carruthers & Co. applied to the agent of the railway company at Fort William for delivery of the wheat to them or their order, and produced the bill of lading therefor, claiming to be entitled thereto; and on the 26th May, 1896, Joseph Harris, for J. Carruthers & Co., notified the railway company not to deliver the wheat to the investment company.

As between J. Carruthers & Co. and Joseph Harris, it was admitted that the latter was not the owner of the wheat.

Under these circumstances, the railway company applied for an interpleader order. The application was opposed by both Harris and the investment company.

The argument was heard by the Master in Chambers on the 7th July, 1896.

Douglas Armour, for the applicants, the railway company, contended that, as the wheat was, by the contract of W. R. Bell, through whom both claimants made claim, placed in the elevator in common with other grain of the same grade, and the party found entitled would receive grain of the same grade as that received by the railway company, in accordance with the custom of warehousing, the conditions existed which entitled the applicants to interplead; and as to any claim for damages for not delivering the wheat, the reason for non-delivery was the existence of the two opposing claims. He referred to *Clark v. McClellan*, 23 O. R. 465; *Attenborough v. St. Katharine's Dock Co.*, 3 C. P. D. 450.

A. H. Marsh, Q. C., for the claimant Harris, contended that the applicants were not entitled to the order, because, (1) the wheat having been mingled with other wheat in the elevator, and having been shipped out of this elevator by the applicants, they were not in a position to comply with Rule 1142 (c), which requires the applicant to swear that he "is willing to pay or transfer the subject-matter

into Court, or to dispose of it as the Court or a Judge may direct;" and (2) because the claimant Harris had an action for unliquidated damages against the railway company for not delivering the wheat under their bill of lading. He referred to *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101; *Rahilly v. Wilson*, 3 Dillon's Circ. Cas. 420; *Furr v. Ward*, 2 M. & W. 844; *Ingham v. Walker*, 3 Times L. R. 448; *Söhne v. British and African Steam Navigation Co.*, W. N. 1888, p. 84.

C. W. Kerr, "for the claimants the Scottish American Investment Company.

Judgment was delivered on the 5th September, 1896.

THE MASTER IN CHAMBERS.—I have no doubt whatever that the applicants are bailees of the wheat in question. The cases referred to on this point by counsel for the claimant do not apply to the facts herein. The case of *Clark v. McClellan*, 23 O. R. 465, referring to two American authorities, applies here. The principle held there has been followed in a number of American cases, both before and subsequent to that case: see *Nelson v. Brown*, 44 Iowa 455; *Seaton v. Graham*, 53 Iowa 181; *Nelson v. Brown*, *ib.* 555; *Ledyard v. Hibbard*, 48 Mich. 421; *Hall v. Pillsbury*, 43 Minn. 33; *Bretz v. Diehl*, 117 Pa. St. 589; *Rice v. Nixon*, 97 Ind. 97; *Schindler v. Westover*, 99 Ind. 395; and a number of others.

Chief Justice Elliott, in delivering his judgment in *Rice v. Nixon*, said: "The rule which we accept as the true one is required by the commercial interests of the country, and is in harmony with the cardinal principle that the intention of contracting parties is always to be given effect. It is not unknown to us, nor can it be unknown to any Court, for it is a matter of great public notoriety and concern, that a vast part of the grain business of the country is conducted through the medium of elevators and warehouses, and it cannot be presumed that warehousemen in receiving grain for storage, or depositors

in intrusting it to them for that purpose, intended or expected that each lot, whether of many thousand bushels, or of a few hundred, should be placed in separate receptacles; * *. This rule secures to the depositor all that in justice he can ask, namely, that his grain shall be ready for him in kind and quantity whenever he demands it. Any other rule would impede the free course of commerce and render it practically impossible to handle our immense crops."

It was not contended that the applicants were not in a position to deliver to the claimants wheat equal in kind and quantity to that received, but merely that they could not deliver the same wheat, and therefore the Rule respecting interpleader did not apply. In my opinion, the Rule does apply. Had it been moneys deposited in a bank for which an interpleader was sought, it would be scarcely contended that the bank must be ready to deliver the exact bills, gold, or silver.

The question, as I understand it, is this. Has the applicant settled the matter for himself by dealing with the subject-matter in dispute? Or is he in doubt as to what he ought to do? Here the applicants are certainly in doubt as to what they ought to do, and have not settled the matter themselves.

As to the question of unliquidated damages, the order herein may be similar to that issued in *Attenborough v. St. Katharine's Dock Co.*, 3 C. P. D. 450, to protect the claimants, if they so desire.

The usual interpleader order will issue.

The claimant Joseph Harris appealed from the Master's order, and his appeal was argued before ROBERTSON, J., in Chambers, on the 21st September, 1896.

A. H. Marsh, Q. C., for the appellant. The transaction amounted to a sale to the railway company: *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101. *Clark v. McClellan*, 23 O. R. 465, distinguishes the Privy Council case, and is different in its facts from this case. The American cases referred to by the learned Master do not cite

the Privy Council case and are adverse to it; but that case is followed by Judge Dillon in *Rahilly v. Wilson*, 3 Dillon's Circ. Cas. 420. *Attenborough v. St. Katharine's Dock Co.*, 3 C. P. D. 450, does not apply here: see Cababé on Interpleader, 2nd ed., pp. 17, 22, 24, 25. Where the applicant may be liable to both claimants, there can be no interpleader: *Farr v. Ward*, 2 M. & W. 844; Cababé, p. 16; *Söhne v. British and African Steam Navigation Co.*, W. N. 1888, p. 84. In this case the applicants are liable to the investment company for conversion of the grain, and to Harris upon the contract contained in the shipping receipt, which estops the railway company from disputing Harris's title. See *Henderson v. Williams*, [1895] 1 Q. B. 521. When one or both parties claim what is in substance unliquidated damages, there can be no interpleader: *Ingham v. Walker*, 3 Times L. R. 448. Here the only claim which the investment company can have against the applicants is a claim for unliquidated damages for conversion. Rules 1141 and 1167 apply only where a claim is made to the possession of specific goods which the bailee or carrier is able specifically to deliver.

Aylesworth, Q. C., for the Canadian Pacific Railway Company, contra.

C. W. Kerr, for the Scottish American Investment Company.

Judgment was delivered on the 26th September, 1896.

ROBERTSON, J.—The judgment of the Master shews that he has considered the question very fully, and refers to numerous cases which support the conclusion he has arrived at.

Mr. Marsh contends that the case of *Attenborough v. St. Katharine's Dock Co.*, 3 C. P. D. 450, is exploded, and has not been followed so as to make it an authority. I have read the case carefully, as well as numerous other cases referred to, and, in my judgment, the case is as near in point as one can well imagine, and is still an authority.

As regards the facts, I am satisfied that the contract entered into between Bell and the Canadian Pacific Railway Company, when the wheat was delivered to the latter for shipment to Fort William, was that the railway company were mere bailees to carry the wheat to the latter place, where they have elevators for receiving grain from their cars from the west, in order to place it in such keeping as to make it easy for all parties to re-ship it either by water or by rail; and that it is a well understood matter of business, between all parties dealing with or handling grain grown in Manitoba or the North-West for transportation, that the elevators of the company are to be used, and that, not the specific grain, but grain of the same standard, quality, and quantity, is what the railway company is to deliver when the same is called for. This fact and practice has become a necessity of the circumstances under which the grain business of the country is now being carried on; and I think the rule referred to by Chief Justice Elliott, in delivering the judgment of the Court in the American case *Rice v. Nixon*, 97 Ind. 97, is most apt and exactly fits the facts and circumstances here.

Besides, should it appear that Harris has a claim against the railway company, notwithstanding the fact that the investment company may be the actual owners of the wheat, his rights are protected by the order, so that there is nothing to prevent him from suing the railway company for breach of what he claims is a contract entered into between that company and him, when he received the transfer of the bill of lading, for the delivery to him of the wheat in question.

The question involved is, no doubt, a very important one, and if the law is as contended for by Mr. Marsh, it must be that the real intention of the parties in the original transaction cannot be taken into consideration in determining that contract. If the contention that this is not a subject of interpleader, for the reason that the specific grain cannot be delivered, is held to be valid, then the railway company have placed themselves by this contract

to carry in a position which, I am satisfied, they never contemplated.

I must, therefore, dismiss the appeal with costs to be paid by Harris both to the railway company and to the investment company.

CRERAR ET AL. V. HOLBERT ET AL.

Parties—Causes of Action—Joinder.

The statement of claim alleged that two of the defendants, by fraudulent representations, induced the plaintiffs to enter into an agreement for the purchase of a horse ; that one of these defendants, in the name of his partner, a third defendant, having agreed to become a co-partner with the plaintiffs in the purchase, made a fraudulent profit by way of commission out of the transaction ; that these three defendants transferred promissory notes, made by the plaintiffs with the intention of carrying out the transaction, to the fourth and fifth defendants, who had notice of the fraud ; and claimed to have the agreement declared fraudulent and void and ordered to be cancelled ; to have the notes declared void and ordered to be cancelled ; or to have the first three defendants ordered to indemnify the plaintiffs against the notes ; damages for the false representations ; or that the defendants alleged to have received a commission should be ordered to account to the plaintiffs therefor.

After the parties had been for more than six months at issue, the defendants applied to strike out the statement of claim as embarrassing :—

Held, that the transaction complained of was one that should be investigated in all its parts on the one record, and that no peculiar difficulty would arise in dealing with it as a whole, and then following such details as might be pertinent.

[October 12, 1896.—*The Master in Chambers*.]

[October 24, 1896.—*Boyd, C.*]

AN application by the defendants Holbert, Eby, and Vance, after issue joined, for an order dismissing this action, or staying proceedings, or striking out the statement of claim as embarrassing, on the grounds that the causes of action of the various plaintiffs were different, and that they could not all be disposed of in the one action, and that the defendants were wrongly joined.

The action was brought by William Crerar and twenty-six other persons against A. B. Holbert, Israel Eby, J. and

R. Forbes, Thomas Vance, John McDonald, and Peter Grenier.

The statement of claim, delivered on the 20th March, 1896, alleged *inter alia* :

2. That by fraudulent representations the defendants Eby and Holbert induced the plaintiffs to sign, with others, an agreement for the purchase from the defendant Holbert of a horse for \$3,000.

10. That the defendant Eby, having, in the name and with the consent of his partner, the defendant Vance, agreed to become a co-partner with the plaintiffs and others in the purchase of the horse, made a fraudulent profit by way of commission out of the transaction.

12. That the defendants Holbert, Eby, and Vance, desiring fraudulently to obtain from the defendants J. and R. Forbes a large part of the \$3,000, approached them and offered them certain promissory notes that the plaintiffs had signed with the intention of carrying out the contract, but which were incomplete and had not been signed by all the parties to the contract, and transferred the notes to the defendants J. and R. Forbes and received from them a large sum of money.

13. That the defendants J. and R. Forbes had notice of the frauds practised upon the plaintiffs.

16. That the plaintiffs had been at great expense for the keeping, care, and attendance of the horse since it was delivered to them.

The plaintiffs claimed :

1. To have the agreement and sale declared fraudulent and void and the agreement ordered to be delivered up to be cancelled.

2. To have it declared that the promissory notes were obtained by fraud and misrepresentation and were issued before they were complete and were therefore void, and to have them delivered up to be cancelled.

3. Or to have the defendants Holbert, Eby, and Vance ordered to indemnify the plaintiffs against the payment of the notes.

4. The sum of \$5,000 damages for the false and fraudulent representations made by the last named defendants.

5. Or that the defendants Eby and Vance be ordered to account to the plaintiffs for all and any profit by way of commission or otherwise received or made by them or either of them out of the sale of the horse to the plaintiffs.

6. The costs of the action.

7. General relief.

The defendants Holbert, Eby, and Vance delivered their defence on the 30th March, 1896.

The defendants J. and R. Forbes delivered their defence on the 28th March, 1896.

The defendants McDonald and Grenier were in the same interest as the plaintiffs, being among the purchasers of the horse.

The motion was argued before the Master in Chambers on the 10th October, 1896.

W. R. Riddell, for the applicants, relied upon *Smurthwaite v. Hannay*, [1894] A. C. 494, and *Peninsular and Oriental Co. v. Tsune Kijima*, [1895] A. C. 661.

W. H. Blake, for the defendants J. and R. Forbes.

J. H. Moss, for the plaintiffs and the defendants McDonald and Grenier.

Judgment was delivered on the 12th October, 1896.

THE MASTER IN CHAMBERS.—In my opinion, this case is governed by *Booth v. Briscoe*, 2 Q. B. D. 496, and not by *Smurthwaite v. Hannay*, [1894] A. C. 494. The case of *Booth v. Briscoe* has been considered in several cases subsequent to it, including *Smurthwaite v. Hannay*, and has not been overruled. I think this action is within the principles of the decision in that, and I refuse the application with costs to the plaintiffs and the defendants J. and R. Forbes in any event.

The defendants Holbert, Eby, and Vance appealed from this decision, and their appeal was heard by BOYD, C., in Chambers, on the 23rd October, 1896.

R. McKay, for the appellants.

W. H. Blake, for the defendants J. and R. Forbes.

J. H. Moss, for the plaintiffs and the defendants McDonald and Grenier.

Judgment was delivered on the following day.

BOYD, C.—Having perused the statement of claim, and having regard to the fact that the cause has for more than six months been at issue, I see no reason for giving effect to this appeal, in whole or in part. The whole complaint grows out of one joint transaction, in which all the parties are implicated, and there is none of them that could properly be left out; the various aspects of the case presented are not inconsistent; the claim as to sharing in the commission arises only if the notes cannot be reclaimed from the defendants the Forbes—who claim to hold for value without notice. Altogether, the transaction complained of is one that should be investigated in all its parts on the one record, and no peculiar difficulty will arise in dealing with it as a whole—and following such details as may be pertinent when the main issue is determined.

Affirm order with costs in the cause to the plaintiffs in any event as against the appellants. Costs of defendants Forbes to be costs in the cause.

PICKEREL RIVER IMPROVEMENT COMPANY

V.

MOORE ET AL.

Discovery—Production of Documents—Penalty—Double Tolls—R. S. O. ch. 160, sec. 42.

The double tolls imposed by sec. 42 of the Timber Slide Companies Act, R. S. O. ch. 160, for false statements, are imposed by way of punishment, and not as compensation ; and therefore an action to recover such double tolls is an action for a penalty, in which discovery of documents will not be enforced.

[October 29, 1896.—*The Master in Chambers.*]

AN action by the plaintiffs, an incorporated company having the powers authorized by and being subject to the provisions of the Timber Slide Companies Act, R. S. O. ch. 160, to recover double tolls on lumber of the defendants which passed over the plaintiffs' works, by virtue of sec. 42, which is as follows :

“ Every company may demand from the owner of any timber intended to be passed through any portion of the works of the company, or from the person in charge of the same, a written statement of the quantity of every kind of timber and of the destination of the same, and of the sections of the works through which it is intended to pass, and if no written statement is given when required, or a false statement is given, the whole of the timber, or such part of it as has been omitted by a false statement, shall be liable to double toll.”

The plaintiffs issued the common præcipe order for production of documents by the defendants, which the defendants declined to comply with, on the ground that the action was for a penalty, and the plaintiffs were, therefore, not entitled to discovery.

The plaintiffs moved to strike out the statement of defence for default in compliance with the order to produce.

The motion was heard by the Master in Chambers on the 27th October, 1896.

S. C. Biggs, Q. C., for the plaintiffs.

J. Bicknell, for the defendants.

Judgment was delivered on the 29th October, 1896.

THE MASTER IN CHAMBERS.—For the plaintiffs it was contended that the action is not one for a penalty; that the double tolls given to them under and by virtue of sec. 42 of R. S. O. ch. 160 are for compensation rather than as a punishment for false statements.

I have considered all the cases referred to by counsel on the application, and, in my opinion, the action is for a penalty, and the double tolls imposed by statute are by way of punishment, and not as compensation.

The case of *Jones v. Jones*, 22 Q. B. D. 425, is, I think, in point, and there it was held by the Divisional Court that an action for pound-breach and rescue of chattels distrained for non-payment of tithe rent-charge, in which the plaintiff claimed treble damages, was a penal action, and that the plaintiff was therefore not entitled to an affidavit on production. In that case Lord Coleridge, Chief Justice, explained the difference between an action for penalty by way of damages—see *Adams v. Batley*, 18 Q. B. D. 625—and an action for penalty by way of punishment. *Jones v. Jones* was approved and followed by the Court of Appeal in *Hobbs v. Hudson*, 25 Q. B. D. 232. I also refer to *Saunders v. Wiel*, [1892] 2 Q. B. 321, where Lord Esher, M. R., in delivering the judgment of the Court, says: “The question raised in this appeal is whether the action is brought for a penalty by way of a penalty—that is, by way of punishment, as it was put in the course of the argument. If it is so brought, it is admitted that interrogatories should not be administered to shew that the defendant has made himself liable to that penalty * * *.”

During the argument counsel for the defendants offered to give discovery if the plaintiffs would withdraw their

claim for double tolls, but this offer was refused by the plaintiffs' counsel.

Holding that the action is for a penalty by way of punishment, I refuse the application. The defendants' counsel admitted that the plaintiffs were entitled to production as to the defendants' counterclaim. The order for production will be limited to such production. Costs in the cause.

CAMPBELL V. WHEELER ET AL.

Costs—Discretion—Judicial Officer—Appeal—Interference—Rule 1170 (a).

The Court will not interfere with the discretion exercised as to costs, unless the Judge whose order is appealed from has proceeded upon some erroneous principle of law or upon some misapprehension of the facts of the case.

Young v. Thomas, [1892] 2 Ch. 134, followed.

It is not intended by Rule 1170 (a) that the discretion of the appellate tribunal should be substituted for that of the judicial officer whose decision is appealed from.

[November 9, 1896.—*Street, J.*]

AN appeal by the defendants from an order of the Master in Chambers disallowing to the appellants the costs of their motion to dismiss the action for want of prosecution, while at the same time dismissing the action, and also disallowing to the appellants their costs of affidavits filed in answer to the plaintiff's motion for summary judgment, although such motion was dismissed.

Rule 1170 (a) provides that "costs of proceedings before judicial officers, unless otherwise disposed of, shall be in their discretion, subject to appeal."

The appeal was argued before STREET, J., in Chambers, on the 9th November, 1896.

W. J. Elliott, for the defendants.

A. G. Murray, for the plaintiff.

Judgment was delivered on the same day.

STREET, J.—The learned Master in Chambers, upon the defendants' application, has made an order dismissing the action, but without costs; he has in the same order disallowed to the defendants the costs of some affidavits filed upon a former motion referred to and disposed of by the same order. The defendants have now appealed against so much of the order as refuses them their costs of the motion to dismiss, and as disallows the costs of the affidavits filed upon the former motion. It is contended by the defendants, under sub-sec. (a) of Rule 1170, that, although these costs are in the discretion of the Master, his discretion is subject to review upon appeal.

The established rule as to appeals from the exercise of judicial discretion with regard to costs is that the Court will not interfere with the discretion which has been exercised, unless the Judge appealed from has proceeded upon some erroneous principle of law, or upon some misapprehension of the facts of the case: *Young v. Thomas*, [1892] 2 Ch. 134. It is not contended that either of these elements exists in the present case. The defendants' counsel has simply brought before me the same facts which were before the Master, and asks me to say that he should not have exercised his discretion upon them in the manner that he has done. If I were to reverse the Master's decision merely because I differed from him in opinion as to what disposition should have been made of the costs, I should simply be substituting my discretion for his, and that is not what is intended by the Rule as interpreted by the authorities. If I were able to find a rule that the defendant who obtains an order in Chambers dismissing an action is always entitled to the order with costs, or if I could find that the Master had mistaken the facts, I should have been entitled to interfere; as it is, I am not; and I must therefore dismiss the motion with costs.

MCKINNON V. CROWE.

*Judgment Debtor—Examination of—Order for—Judgment for Costs—
Interpleader Proceedings—Motion to Commit—Rules 926, 932, 1360—
Concealment of Property.*

An order under Rule 932 for the examination of a judgment debtor for costs in interpleader proceedings having been made upon hearing all parties, an objection that the Rule is not applicable to such proceedings cannot be raised on a subsequent application to commit.

The judgment debtor, upon hearing that judgment had gone or was about to go against her, turned all the property she had into money and sent it to a friend in a foreign country, where it remained, and upon her examination she refused or professed to be unable to give any information as to where it was. After she had had ample opportunity to become aware of her position, but had done nothing towards satisfying the plaintiff's claim, an order was made for her committal to gaol for three months and for payment by her of the costs of the motion.

[November 12, 1896.—*Street, J.*]

AN application by the plaintiff to commit Mary Leah Crowe to gaol under Rule 932, upon the ground that it appeared from her examination as a judgment debtor that she had concealed or made away with her property in order to defeat or defraud the plaintiff, who had a judgment against her for costs of certain interpleader proceedings.

The motion was argued before STREET, J., in Chambers, on the 30th October, 1896.

Aylesworth, Q.C., for the motion.

Biggs, Q.C., contra.

Judgment was delivered on the 12th November, 1896.

STREET, J.—Mary Leah Crowe is a judgment debtor only in respect of the costs of certain interpleader proceedings in which judgment for costs has been entered against her; and it was contended before me by her counsel that Rule 1360, which has been substituted for Rule 926, and gives a judgment creditor for costs only, a right to examine his debtor touching his estate, etc., does not apply to interpleader proceedings. It appears, however, that Mary Leah

Crowe was examined in these proceedings as a judgment debtor under an order made by the Chief Justice of the Common Pleas, which was produced upon the motion, and that it was made in the presence of her counsel after hearing argument; and it was stated by counsel before me that the objection now urged was urged by her counsel during that argument, and was overruled. It evidently was a matter which she might then have urged, and that was the proper occasion upon which it should have been urged, if it was not. Under these circumstances, I am bound to treat the objection now urged as having been determined by the order then made, and to hold that the order for her examination was properly made.

So far as the merits are concerned, there is nothing to be said in favour of the judgment debtor. She had some \$1,600 at the time the judgment was recovered, which was partly invested and partly on deposit; upon hearing that judgment had gone or was about to go against her, she collected and withdrew these moneys and has had them forwarded to a friend in the United States, where they remain, and she refuses or professes to be unable to give any information as to where they are. It is plain from the examination that the object she had in forwarding the money to the United States was to withdraw it from the reach of the execution, and that she has concealed and made away with it for that purpose. She has had ample opportunity to become aware of the position in which she has placed herself, but she has not done anything towards satisfying the plaintiff's claim, and she appears to have no property but this money.

Under the circumstances, no course is open to me but to make an order for her committal to the county gaol of the county of Wellington for three months, and to order her to pay the costs of this application.

BARBER ET UX. V. TORONTO RAILWAY COMPANY ET AL.

Jury Notice—Motion to Strike out—Non-repair of Highway—Law Courts Act, 1896, sec. 5.

In an action against a railway company and a city corporation to recover damages for injuries sustained by the plaintiffs by being upset upon a street in the city owing to the heaping up of snow upon the side of the roadway, the plaintiffs in their statement of claim alleged that the corporation had permitted this to be done, and had thereby allowed the street to be out of repair and dangerous for travel :—

Held, that the action must be treated as one for non-repair of a street within the meaning of sec. 5 of the Law Courts Act, 1896 ; and a jury notice was therefore irregular and should be struck out.

It made no difference that the motion to strike out the jury notice was made by the railway company and not by the city corporation, as the latter appeared and supported the motion.

[November 13, 1896.—*Street, J.*]

[November 24, 1896.—*Divisional Court.*]

MOTION by the defendants the Toronto Railway Company, in an action brought against that company and the corporation of the city of Toronto, to recover damages for injuries sustained by the plaintiffs by reason of their having been upset upon a highway in the city, for an order striking out the jury notice filed and served by the plaintiffs, upon the ground that the action was one which must be tried without a jury, under sec. 5 of the Law Courts Act, 1896, which is as follows :—

All actions against municipal corporations for damages in respect of injuries sustained through non-repair of streets, roads, or sidewalks, shall hereafter be tried by a judge without a jury, and the trial shall take place in the county in which the road, street, or sidewalk is situated.

The motion was argued before STREET, J., in Chambers, on the 9th November, 1896.

J. Bicknell, for the motion.

W. C. Chisholm, for the defendants the city of Toronto, supported the motion.

Runey, for the plaintiffs, opposed it.

Judgment was delivered on the 13th November, 1896.

STREET, J.—This action is brought to recover damages from the defendants upon a statement of claim alleging that the defendants the railway company had removed the snow from their tracks in the centre of the street, and had heaped it up at the side of the roadway, thus rendering the street dangerous for travel; that the defendants the corporation knowingly had permitted this to be done, and had, by so doing, allowed the street to be out of repair and dangerous for travel; and that the plaintiffs, while driving over the said street, had been upset and injured.

Issue having been joined, the plaintiffs served a jury notice, whereupon the defendants the railway company served a notice of motion to strike it out under sec. 5 of the Law Courts Act, 1896.

The defendants the city corporation appeared upon the motion and supported the application. It was contended by the plaintiffs' counsel that the case was within *Rowe v. Corporation of Leeds and Grenville*, 13 C. P. 515, and was therefore not a matter of non-repair, but of obstructing the highway.

The cases upon non-repair and obstruction have run into one another a good deal, but I think that a highway may be treated as out of repair when obstructions such as piles of snow or gravel are allowed by the corporation to remain upon it for an unreasonable time, although the same obstructions might also be treated as mere obstructions under other circumstances: see *Castor v. Township of Uxbridge*, 39 U. C. R. 113.

Here the plaintiffs have in their statement of claim expressly alleged the piles of snow as putting the highway out of repair.

The plaintiffs further object that the motion here is not made by the city but by the railway company; but whatever force there might have been in the objection is removed by the fact that the city appears and supports the motion.

The motion must therefore be allowed and the jury notice struck out, with costs to the defendants in any event.

The plaintiffs appealed from this decision, and their appeal was heard by a Divisional Court composed of BOYD, C., and FERGUSON and ROBERTSON, JJ., on the 24th November, 1896.

Raney, for the appellants.

J. Bicknell and *W. C. Chisholm*, for the defendants, were not called upon.

THE COURT dismissed the appeal with costs, agreeing with the decision of Street, J.

ZAVITZ V. DODGE ET AL.

Costs—Taxation—Apportionment—Common Defence by Several Defendants.

An action by a judgment creditor against three defendants, one of whom was the judgment debtor, to set aside a conveyance as fraudulent, was dismissed with costs, but with the direction that the costs of the judgment debtor should be set off against the judgment recovered by the plaintiff. There was a common defence by one solicitor for all three defendants, and no separate proceedings for the benefit of particular defendants:—

Held, upon appeal from taxation, that a set-off of one-third of the whole costs taxed to the defendants should be allowed.

Re Colquhoun, 5 DeG. M. & G. 35, and *Clark v. Virgo*, 17 P. R. 260, followed.

[November 18, 1896.—*Boyd*, C.]

AN appeal by the plaintiff from the taxation of the defendants' costs by a local officer. The facts are stated in the judgment.

The appeal was heard by BOYD, C., at the London Weekly Court, on the 13th November, 1896.

Folinsbee, for the plaintiff.

Talbot Macbeth, for the defendants.

Judgment was delivered on the 18th November, 1896.

BOYD, C.—Appeal heard at London Weekly Court from Master's taxation.

The action was by a judgment creditor against three defendants, one of whom was the judgment debtor, to set aside a conveyance alleged to be fraudulent as to creditors. Action was dismissed with costs, but with the direction that the costs of the judgment debtor were to be set off against the judgment recovered by the plaintiff.

There was a common defence by one solicitor for all three defendants.

The amount to be set off will be so much of the costs of the whole defence as are properly payable by this defendant to the joint solicitor. Now, the rule is well settled, based upon the certificate of the Master in *Re Colquhoun*, 5 DeG. M. & G. 35, that the general costs of a common defence are divided equally among the defendants who unite in their defence, or have one common defence, subject to the particular liability of one for any proceedings taken for his exclusive advantage.

Here there are no such separate proceedings for the benefit of particular defendants; there was one defence, for the costs of which all are equally liable to contribute to their solicitor. Therefore I think the Master has erred in allowing a set-off of only \$12.86 out of a total bill taxed at \$176.69. The true measure of set-off should be one-third of this latter sum. I may note the late case of *Clark v. Virgo*, 17 P. R. 260.

I do not interfere on the ground of appeal taken as to counsel fees allowed; and success being thus divided, this judgment is without costs to either party.

JOHNSTON ET AL.

V.

CONSUMERS' GAS COMPANY OF TORONTO.

Amendment—Adding Plaintiff—Attorney-General—Final Judgment.

A motion made by the plaintiffs after the judgment of this Court, 23 A. R. 566, for leave to amend by adding the Attorney-General as a party plaintiff in order to meet the difficulty raised by the judgment that the plaintiffs had no *locus standi*, was refused, upon the ground that such an amendment could not be made after final judgment.

[November 20, 1896.—*The Court of Appeal.*]

MOTION by the plaintiffs for an order for leave to amend by adding the Attorney-General for Ontario (upon his written consent filed) as a party plaintiff in order that the action might be so constituted as to meet the difficulty raised by the judgment of this Court (23 A. R. 566) holding that the plaintiffs had no *locus standi*, and to enable the Court to dispose of the substantial merits of the action.

The motion was argued before OSLER and MACLENNAN, JJ. A., and ROSE, J., on the 20th November, 1896.

Moss, Q. C., and John MacGregor, for the plaintiffs. If the Judge of first instance, who heard the special case agreed upon by the parties, had been of opinion that the action could not be maintained by the plaintiffs, he would have ordered it to stand over in order that the amendment now sought might be made. Rule 445 gives power to add or substitute a plaintiff where a *bond fide* mistake is made, and, upon demurrer for want of parties, such an amendment was made in *Duckett v. Gover*, 6 Ch. D. 82; *Long v. Crossley*, 13 Ch. D. 388; and *Mason v. Harris*, 11 Ch. D. 97. It was quite evident that the mistake here was *bond fide*. Mr. Justice Ferguson thought the action was properly constituted, and the plaintiff's advisers were sincere in thinking so too. *Attorney-General v. Mayor of Dublin*, 1 Bli. N. R. 312, was a case very like this. [OSLER, J. A.—

Have you found any case in which an amendment of this kind has been allowed after the submission of a special case ?] Special cases are very rare. *Savage v. Snell*, L. R. 11 Eq. 264, was not altogether such a case as this, but it was a special case, and there a party was added. *Atty v. Etough*, L. R. 13 Eq. 462, was a similar case. [OSLER, J. A.—Do you find any case in which a party has been substituted after final judgment ?] *Woodward v. Shields*, 32 C. P. 282, was after judgment, when the case was before the Divisional Court. The judgment here is no more final than there. See also *Cooper v. Saylor*, 2 O. R. 398. [OSLER, J. A.—The judgment of this Court is the final judgment in the cause; the appeal to us is but a step in the cause, but when judgment is given here, it is final.] Suppose it had come here on demurrer, it would not be final. [OSLER, J. A.—Would it not be an entirely different special case, if the Attorney-General were added ?] [ROSE, J.—Would it not involve a re-argument ?] We are content that the case should stand for judgment on the argument already heard and upon the special case as originally submitted. The amendment proposed would turn the case into a combined information and action. Though the plaintiff might not be entitled to a judgment for the payment of money, he would be entitled to a judgment compelling the defendants to observe the provisions of the statute.

McCarthy, Q. C., and *W. N. Miller*, Q. C., for the defendants, were not called upon.

OSLER, J. A.—We all agree that the motion should be refused. One difficulty in the way of granting it is the fact that the hearing was upon a special case agreed upon by the parties, which involved the decision of the objection to the constitution of the suit now sought to be got rid of by the amendment. A further and a fatal objection is that such an amendment cannot be made after a final judgment. The case of *The Duke of Buccleuch*, [1892] P. 201, may have given encouragement to the motion. But

there the amendment was allowed expressly upon the ground that the action had not been finally determined. Where final judgment has been given, Rules 324 and 445 do not apply.

MACLENNAN, J. A.—I agree that the application comes too late after final judgment. There is another ground upon which the amendment should be refused. If this were turned into an information and action, it would not be possible to do otherwise than dismiss the action, as we have already done. There would then be left the information alone, and that would be a totally different kind of case. The plaintiff would have no status to maintain the information and action.

ROSE, J.—I agree. I rest my judgment on the ground taken by my brother Osler ; but I may point out, besides, that the application is anomalous, and the anomaly is one that ought not to be encouraged. The application is for a reconstitution of the suit—practically to turn it into a new suit. The applicants do not seek a reargument in case the Court allows the suggested amendment, but desire to go, as it were, *per saltum* to the Privy Council from the Judge of first instance (whose decision was in their favour), without any decision on the points in question by the intermediate court of appeal.

Motion refused with costs.

RE BENFIELD AND STEVENS ET AL.

Interpleader—Jurisdiction—Foreign Claimants—Fund Payable in Foreign Country.

Under an agreement with respect to a mining property in this Province, a certain royalty was payable in a foreign country to foreigners residing therein, by a person also residing therein, but was claimed by another person in the jurisdiction :—

Held, upon an application for an interpleader order, that the Court had no power to direct foreigners to come within its jurisdiction to defend their right to the fund.

[November 3, 1896.—*The Master in Chambers.*]

AN application for an interpleader order by Thomas Benfield, claiming to be a lessee of certain mining premises and plant under an agreement between W. H. Stevens, Helen H. Newberry, and R. P. Rothwell, all of the United States, of the first part, and himself, also of the United States, of the second part, bearing date the 21st August, 1895. Under and by virtue of this agreement Benfield was to pay Stevens *et al.* a royalty upon ore to be mined by Benfield out of the property mentioned in the agreement, and situate in the county of Hastings, in this Province; such sum in each year to be twenty-five cents a ton for not less than 9,125 tons, whether that quantity had been mined or not. Stevens *et al.* were second mortgagees of the property and plant in question; the first mortgage thereon being to one Robert Richardson, trustee. The first mortgage was in arrear, and the trustee had claimed from Benfield the royalty due by him under his agreement with Stevens *et al.*, while the latter also made claim to be paid the same royalty. Under these circumstances, Benfield applied for an order allowing him to pay the amount due by him into Court, and directing Richardson and Stevens *et al.* to proceed to the trial of an issue as to which party was entitled to the same.

The motion was argued before the Master in Chambers on the 31st October, 1896.

W. E. Raney, for the applicant.

J. Bicknell, for Stevens *et al.*

W. H. Biggar, for Richardson.

Judgment was delivered on the 3rd November, 1896.

THE MASTER IN CHAMBERS.--The application is opposed on behalf of Stevens *et al.* on the ground, among others, that the parties are out of the jurisdiction, and therefore this Court can make no final order against them.

The applicant and Stevens *et al.* all reside out of the jurisdiction; the money which is sought to be paid into Court herein is made payable under the agreement in the city of Detroit, out of the jurisdiction of this Court.

It is true that Lord Eldon in *Stevenson v. Anderson*, 2 V. & B. 407, held that the Court had authority to direct an interpleader order against a person resident out of the jurisdiction, and that a final order could be made against him; but in that action, as also in *East and West India Dock Co. v. Littledale*, 7 Ha. 57, it appears that the subject-matter of the application was within the jurisdiction, and that the foreigner in order to obtain it would have to come within the jurisdiction to obtain the assistance of the Courts.

In *Credits Gerundeuse v. Van Weede*, 12 Q. B. D. 171, the Divisional Court held that where the plaintiffs sued for goods in the possession of the defendant, and it appeared that a foreigner residing out of the jurisdiction claimed the right to the same goods, and would probably sue the defendant in respect of them, the defendant should have leave to serve an interpleader summons out of the jurisdiction upon the foreigner. It was in that case pointed out by Baron Pollock, in delivering the judgment of the Court, that the Court by making the order for service did not assert any present jurisdiction over the foreigner, or propose to compel him to submit to its process, but merely gave him notice of the proceedings that were being taken; so that if, after such notice, he should decline to submit to the jurisdiction of the Court, and allow the rights as between the plaintiffs and defendant to be determined in his absence, and afterwards commence an action against the

defendant in respect of the identical claim made by the plaintiffs, he might be barred from continuing proceedings which would be harassing upon the defendant. The cases of *Stevenson v. Anderson* and *East and West India Dock Co. v. Littledale* were referred to and followed.

In *Weldon v. Gounod*, 15 Q. B. D. 622, the Divisional Court held that a plaintiff having obtained judgment against the defendant, a foreigner resident out of the jurisdiction, there was no jurisdiction to grant leave to serve a summons on the defendant out of the jurisdiction, calling on him to shew cause why a receiver should not be appointed. The Court held that the decision in *Credits Gerundeuse v. Van Weede* should not be extended.

In *Re Busfield*, 32 Ch. D. 123, Lord Justice Cotton, in delivering the judgment of the Court of Appeal, referring to *Credits Gerundeuse v. Van Weede*, said (p. 132):—"As regards the cases referred to, the first, *Credits Gerundeuse v. Van Weede*, was a case of interpleader, and the decision may perhaps be supported on the ground that the object of service was not to give jurisdiction over the party served, but only to give him notice of a proceeding affecting his rights, that he might, if he pleased, come in and defend them, and it is on this that Baron Pollock rests his judgment."

In *Ex p. Brandon*, 54 L. T. N. S. 128, the Divisional Court refused leave to serve a summons to tax a bill of costs on a client out of the jurisdiction. Mr. Justice Smith in his judgment referred to *Credits Gerundeuse v. Van Weede*, and said that the principle of Baron Pollock's decision in that case should not be extended.

See also *In re Cliff*, [1895] 2 Ch. 21.

In my opinion, the applicant being a resident out of the jurisdiction, as also *Stevens et al.*, and the fund in dispute being payable out of the jurisdiction, I have no authority to make an order directing *Stevens et al.* to come within this jurisdiction and defend themselves as to their right to such fund. I think the cases referred to above bear this out in principle.

The application will therefore be refused with costs.

AIKINS ET AL. V. DOMINION LIVE STOCK ASSOCIATION
OF CANADA ET AL.

*Club—Committeemen—Liability—Amendment—Parties—Co-contractors—
Application to Add—Affidavit—Costs.*

Where credit is given to an abstract entity such as a club, the creditor may look to those who in fact assumed to act for it and those who authorized or sanctioned that being done, at all events where he did not know of the want of authority of the agent to bind the club ; ROSE, J., dissenting.

Review of English cases on this subject.

The liability in such cases is not several, but joint.

By analogy to the old practice where a plea in abatement for non-joinder of co-contractors was pleaded, a defendant now moving to stay proceedings until the co-contractors are added as parties should shew by affidavit the names and residences of the persons alleged to be joint contractors whom he seeks to have added, and the same liability as to costs, in case persons are added who turn out not to be liable, should be entailed upon him.

In an action begun against an unincorporated company, as a partnership, to recover a sum for costs paid by the plaintiffs, an order in Chambers allowing the plaintiffs to amend by adding as defendants certain members of the executive committee of the company, and to charge them in the alternative as personally liable by reason of their having sanctioned the arrangement between the plaintiffs and the association, was affirmed without prejudice to the defendants applying to add parties.

[October 22, 1896—*Divisional Court.*]

AN appeal by the defendants from an order of the Master in Chambers allowing the plaintiffs to amend their statement of claim by setting up an alternative cause of action, and adding eight new defendants.

The action was originally brought against the above association, an unincorporated company, alone, to recover \$3,000, the balance of certain costs incurred in England, and paid by the plaintiffs for the defendants, as alleged. The added parties were members of the executive committee of the association. The amendment allowed was, briefly, for the purpose of enabling the plaintiffs to allege that if the defendant association was not a partnership, it was a club, and the added defendants were liable personally to the plaintiffs.

The appeal was argued before a Divisional Court composed of MEREDITH, C. J., and ROSE and MACMAHON, JJ., on the 23rd March, 1896.

Allan McNab and *L. G. McCarthy*, for the defendants.
W. R. Smyth, for the plaintiffs.

Judgment was delivered on the 22nd October, 1896.

MEREDITH, C. J.—Appeal by the defendants from an order of the Master in Chambers allowing an amendment to the plaintiffs' claim by setting up an alternative claim for relief against certain defendants allowed by him to be added.

The plaintiffs' action was brought against the association, which was sued as a partnership, for breach of a contract alleged to have been made between the association and the plaintiffs.

The alternative claim which was sought and has been allowed to be set up is contained in paragraph 8a. of the amended statement of claim. In it the plaintiffs say that if the association is not a partnership, it is a club, and that the added defendants were members of the executive committee of the association, and expressly sanctioned the arrangement entered into between the plaintiffs and the association by which the association undertook to pay the costs for the recovery of which the action is brought; and that, "by reason of their sanction" of the arrangement, they are personally liable to the plaintiffs to pay their claim; and that it should be declared that they are so liable; and judgment against them accordingly is the alternative relief sought by the amendment to the statement of claim.

It is objected by the defendants that paragraph 8a. of the amended statement of claim discloses no cause of action against the added defendants, and that the amendment ought not therefore to have been allowed.

It must be admitted that the case made by the plaintiffs against the added defendants, as it appears upon the amended statement of claim, brings them perilously near to the position of the plaintiff in *Jones v. Hope*, 3 Times L. R. 247n., who, on facts not differing very materially

from those upon which the plaintiffs rely, was held not to be entitled to recover. See also *Overton v. Hewett*, 3 Times L. R. 246 ; *Draper v. Earl Manvers*, 9 Times L. R. 73.

I do not think, however, in view of the cases of *Steele v. Gourley*, 3 Times L. R. 772 ; *Barnett v. Wood*, 4 Times L. R. 278 ; *Stansfield v. Ridout*, 5 Times L. R. 656 ; *Harpur v. Granville-Smith*, 7 Times L. R. 284 ; and *Thomas v. Wilson*, 20 U. C. R. 331 ; that we should, upon this application, determine that the amended statement of claim discloses no cause of action against the added defendants.

The line of separation between the two classes of cases is very fine, and, with the latitude now-a-days allowed in framing pleadings, I do not think that the plaintiffs should be prevented from bringing the case to trial, in order that, if they can do so, they may shew a state of facts entitling them to recover on the principle on which the last mentioned cases were decided—which I understand to be that where credit is given to an abstract entity such as a club, the person who gives the credit to it may look to those who in fact assumed to act for it and those who authorized or sanctioned that being done, at all events where he did not know of the want of authority of the agent to bind the club.

Such cases are to be determined upon the application of the principles of the law of agency—the principles themselves being well understood, but the application of them difficult, apparently, in cases such as these.

I do not agree with the argument of the plaintiffs' counsel that the liability in such cases is several ; it is, it appears to me clearly, joint ; the act upon which the alleged liability is based was done by some one assuming to act for a principal—the association ; he could not bind the association, having no authority to do so, and may be liable as principal, and those who sanctioned his act or ratified it are in the same position as he, and therefore liable also ; but all are liable for the one act, and as if done by them together ; the liability must, therefore, be a joint one.

I do not think, however, that, upon the material before

the Master, the defendants were entitled to insist upon the other members of the association being added as defendants.

According to the practice before the Judicature Act, the defendants must have pleaded the non-joinder of the persons who they alleged were joint contractors with them; and where such a plea was pleaded, it was necessary that it should aver that the joint contractor not made a defendant was living within the Province, and should state the place of his residence, and an affidavit of the truth of the plea was required to be filed with it: C. S. U. C. ch. 22, secs. 69, 70; and by sec. 71 it was provided that if, after such a plea and an amendment by the plaintiff by adding the alleged joint contractor, it appeared that the original defendant or any of several original defendants was liable, and that one or more of the persons named in the plea of abatement were not liable, the defendant who was not liable should be entitled to his costs against the plaintiff, but the plaintiff was allowed such costs, together with the other costs on the plea in abatement and amendment, as costs in the cause against the defendant who pleaded it.

Now that the plea in abatement for non-joinder is abolished, and the defendant's proper remedy in cases where he is aggrieved by the non-joinder of co-contractors is to apply for an order that the joint contractors be added as parties to the action, and the practice is to stay proceedings in the action until they are added, the granting of an application under the Rule for the adding of parties ought, it seems to me, unless under special circumstances, to be governed by the same principles as were applicable to the pleading of the plea of abatement under the old practice, and the defendant applying should shew by affidavit the names and residences of the persons alleged to be joint contractors whom he seeks to have added, and the same liability as to costs in case persons are added who turn out not to be liable, though the plaintiff should recover against the original defendants or one of them, should be entailed upon the defendant applying.

This practice was adopted by my brother Rose in an unreported case, and seems to have commended itself as a proper one to Mr. Justice Chitty in *In re Harrison, Smith v. Allen*, [1891] 2 Ch. 349.

In the present case the defendants insisted that it should be a term of the order allowing the amendment that the plaintiffs should be required to join all the members of the association as defendants, and that without any affidavit as to who they were or where they resided being made by them or on their behalf, or any condition being imposed as to the liability of the defendants to the costs occasioned by the parties being added, if the plaintiffs should fail as to some of them and yet succeed as to one at least of the defendants whom they desired to add.

In this, I think, the defendants were wrong, and that, if a proper application be made to add additional defendants under Rule 324, it should be upon the material and the terms I have mentioned; and the Master should, in dealing with it, not require the plaintiffs to add as defendants persons against whom they have not, at least, a *prima facie* right to recover, if entitled to recover at all against the now added defendants or any or either of them.

The appeal should, in my opinion, and for the reasons I have mentioned, be dismissed, but without prejudice to any application which the defendants may choose to make for the addition of parties under the Rule; and the costs of this appeal should be costs in the cause to the plaintiffs in any event.

ROSE, J.—I assume that it may be taken for granted that the plaintiffs' right to recover must depend upon proving a promise by the defendants to pay the moneys claimed out of their own personal estate, and that such promise must have been either express or implied. If the pleading shews that the payments were made by the plaintiffs upon a promise by the association, and not by the other defendants, and that the promise to repay was not by

such other defendants, but by the association, then, as it seems to me, the plaintiffs not only do not shew a contract making such other defendants liable, but, on the contrary, shew that the contract was made, not with such defendants, but with the association.

It becomes very material therefore to see exactly what the plaintiffs allege. In their statement of claim they seek to charge the defendant association with a liability upon an express agreement. In paragraph 2 it is averred as follows:—

“The said defendant association * * requested the plaintiffs to defend certain actions, * * and as an inducement to the plaintiffs * * the defendant partnership agreed with the plaintiffs to pay all the plaintiffs’ costs for defending said actions * * and, at the solicitation of the defendant partnership, and in consideration of their said request and promise, the plaintiffs defended the said actions * *.

“3. The defendant partnership paid, in pursuance of their agreement, a portion of the said costs, amounting altogether to \$4,265.95, which left a balance for which the said defendants were liable amounting to \$4,866.66, which the plaintiffs, at the request of the defendant partnership and the defendant John Dunn, paid on or about the 1st day of October, 1888, by way of an advance to the defendants and the said Dunn.

“4. The defendant partnership have since, on or about the 16th March, 1891, repaid the sum of \$1,100 on account of said advance by the plaintiffs.

“8a. The plaintiffs say that if the defendant association is not a partnership as hereinafter alleged, then that the said association is a club, and that the defendants Thomas Crawford, John Dunn, G. F. Frankland, A. J. Thompson, William Hearn, T. G. Robson, A. Rawlings, R. Stroud, and Henry Heal, and each and every of them, being members of the executive committee of the said association, expressly sanctioned the arrangement entered into between the plaintiffs and the defendant association by which the

defendant association undertook to pay the costs hereinbefore mentioned, and that, by reason of their said sanction of the said arrangement hereinbefore set forth, the said defendants" (repeating the names) "are personally liable to the plaintiffs to pay the amount claimed in this action; and the plaintiffs claim the same accordingly."

As I understand the last paragraph, which is introduced by way of amendment, it carries into it the statements of fact in the preceding paragraphs, and the effect of the whole is to allege a request made of the plaintiffs by the association to incur certain liability for costs, which the association promised to pay and discharge; that, on the strength of such request and promise, the plaintiffs did incur the liability, and were compelled to pay the costs for which they became liable, and the association did not perform its promise, whereby the plaintiffs suffered damage. The only allegation connecting the defendants, other than the association, is that such defendants, being members of the executive committee of the association, expressly *sanctioned* the arrangement entered into between the plaintiffs and the association by which the association undertook to pay such costs, and that, *by reason of such sanction*, such defendants, other than the association, became personally liable.

The word "sanctioned" must, I take it, mean either authorized or ratified. Assume that it is taken to mean authorized, which is probably not its primary meaning, what did such committee authorize? It is not said or suggested that such committee made any request of the plaintiffs or made any promise, or in any sense authorized the plaintiffs—if there could be any meaning to such a statement—to enter into this contract, and therefore it must mean, if it means anything, that the committee authorized the association to enter into an agreement. Now what was the agreement that the committee authorized? It was an agreement by which the association undertook to pay the costs for which the plaintiffs were incurring a liability, and the agreement entered into was

one by which the association, and not the committee, promised to pay.

If the word "sanctioned" is to be taken to mean ratified, then the allegation is, simply, that after the plaintiffs had undertaken a liability, at the request of the association, and on its promise to pay those costs, the committee ratified the agreement. Such a meaning is in such connection, I think, senseless, because the agreement did not purport to be made on behalf of the committee or at the request of the committee or for the purpose of the committee, but was an agreement by the association with the plaintiffs for and on behalf of the association and not for and on behalf of the committee. In other words, the association was the principal, and not the agent of the committee to make such an agreement.

Where then is there any averment or allegation of fact from which a promise, express or implied, could be drawn? I have examined with care the cases cited with reference to what may be called club law, and, I take it, it is clear from them all that if a party chooses to contract with a club, although it is not an entity with which a contract can be made, yet if a party chooses to make a contract with a club, looking to the club for payment, no member of the club becomes liable to pay, although the club is not liable, nor does a member of any committee become liable as being a member of the committee, and the principle upon which members of a committee have been held liable has been, as I understand it, that the committee was the principal, and that the person ordering the goods, be it the steward or the secretary of the club, was an agent acting on behalf of the committee, to supply goods which the committee sanctioned, authorized, ordered, or directed to be ordered, and so the committee was the principal chargeable with the price of the goods supplied. In other words, where a committee of a club orders goods, a jury may find that the committee ordered them on an implied promise to pay for the goods; but in none of the cases, I think, can any statement of the law be found that

where there was a contract but not with the committee, where there was a request but not from the committee, where there was a promise to pay but not by the committee, the members of the committee could in anywise be held personally responsible.

The case of *Jones v. Hope*, found in a foot-note to *Overton v. Hewett*, in 3 Times L. R. 247, contains all the statements of principle which I have endeavoured to restate. There, although the corps, as an entity, could not be bound, it was held by Lord Justice Brett that a contract by Colonel Dunford, as agent for the corps, which was to bind the corps as an entity, and which provided for payment of the plaintiff out of the money of the corps, did not in any wise render Colonel Dunford liable.

Now, assume that the pleading in this case had stated that at the request of the committee of the association, acting for and on behalf of the association, the plaintiffs incurred a liability upon the promise of the committee that the association would pay the costs, the liability for which the plaintiffs were incurring, could there be any question as to the non-liability of the members of the committee? The very statement negatives any promise by the committee to be responsible. The only promise to pay averred is a promise of the association, and that negatives a promise of the committee, and even if the committee had been the agent of the association to make this contract, which is a far stronger case than that set out in the pleadings, I find no authority which would make the members of the committee liable personally.

It seems to me that the whole case fails as made by the amended pleading, if I am right in my view that the averment that the defendant association undertook to pay the costs means that those costs were to be paid by the association out of the moneys of the association.

In *Steele v. Gourley*, 3 Times L. R. 772, the defendants were held liable on the principle that they as members of the committee ordered the goods and ordered them as principals, and that the principal was the committee and

not the club. As Lord Justice Lindley said in that case, if the evidence had rendered necessary the finding that the plaintiff contracted to be paid out of the funds of the club, no liability would have been shewn. The direction to the jury was, as found on p. 119 of the same volume, that "if they (the jury) found that the plaintiff had supplied the goods in question on the faith that he would be paid for them by the executive of the club," the jury might find for the plaintiff. Mr. Justice Wills, in giving judgment in *Overton v. Hewett*, said that he "gathered from the report of that case that there was evidence there of an understanding that the position of the committee of management implied a personal liability for the club debts," and distinguished that case from *Overton v. Hewett* on that ground.

In *Barnett v. Wood*, 4 Times L. R. 278, the articles supplied were produced by one of the plaintiffs at a meeting at an hotel, the meeting being appointed by letter, at which the plaintiff met the committee of the club, including the two defendants, the defendants taking the chief part in selecting and ordering the goods. The defendants there were held liable.

Stansfield v. Ridout, 5 Times L. R. 656, was a case of beer supplied to a club on the order of the secretary under the authority of the committee. The committee were treated as principals and the secretary as their agent.

In *Harper v. Granville-Smith*, 7 Times L. R. 284, the jury found, amongst other things, that the defendant allowed himself as a member of the committee to be held out as authorized to order. There again the committee was treated as principal and the secretary as agent.

In *Draper v. Earl Manvers*, 9 Times L. R. 73, the plaintiff was nonsuited. Mr. Justice Wright, after having had cited to him the cases to which I have referred, or some of them, stated that it was clear that mere membership of the committee would not make the defendant liable, and the fact that he acted on the committee did not make him liable for goods which were ordered when he was not present.

That statement of the law is, as I understand it, the one recognizing the principle that, to entitle the plaintiff to judgment, the committee in ordering the goods must be treated as principals rendering themselves personally liable.

In our own Courts there is the case of *Thomas v. Wilson*, 20 U. C. R. 331, where the defendant, a member of the committee, was held liable on the ground that the committee ordered the goods. Robinson, C. J., in giving judgment, stated at p. 337: "The evidence, we think, when carefully considered, does not warrant us in holding that they were acting for the corporation in ordering these quantities of champagne and porter."

I am of opinion, therefore, that, when the plaintiffs aver the request and promise to be by the association, they state no fact on which a promise by the committee may be inferred, simply by saying that the committee sanctioned the arrangement or agreement.

In my opinion, therefore, the amended pleading discloses no cause of action, and the appeal should be allowed to that extent.

There should be no costs, as I agree that the application to have the other members of the association added as parties should fail.

MACMAHON, J.—It is in the form in which paragraph 8a (allowed by the Master in Chambers to be added to the statement of claim), rather than in the substance, that the pleading is objectionable. What it means, I take to be this; that the added defendants—being the executive committee of the defendant association—had, in the name of the association, sanctioned the entering into of an agreement whereby the association, as a partnership, would be liable to the plaintiffs for the costs mentioned in the statement of claim. But if no partnership existed between the members comprising the Dominion Live Stock Association, then the members of the association were a club, and the executive committee of the association, who had sanc-

tioned the entering into of such agreement, are personally liable to the plaintiffs on the contract.

If the association was a club, managed by a committee, the members of such club would not be personally liable for goods supplied to the club on the authority of the committee, as the committee has no power to bind the members of the club: *Flemyng v. Hector*, 2 M. & W. 172. The person, therefore, who supplies goods on credit can only sue those members of the committee who are privy to the contract: *Todd v. Emly*, 7 M. & W. 427. And see the fifth finding in *Re London Marine Insurance Association*, L. R. 8 Eq. 176; Roscoe's N. P. Evidence, 16th ed., p. 531; and also the cases referred to in the judgment of the learned Chief Justice.

The other ground of appeal in the notice of motion is "that the learned Master should not have added said parties as defendants thereto without adding all the members of the defendant association, as these defendants asked and insisted that all or none of the members of the defendant association should be added, because the liability (if any existed) is a joint liability on the part of all the members of the said association."

The Master in Chambers was, I think, right on the material before him in refusing to make it a term of the order that all the members of the association be added by the plaintiffs as parties defendant to the action. If a partnership existed, then the members of the partnership are in law only jointly liable unless in cases coming within *In re Davison*, 13 Q. B. D. 50; and if no partnership existed, but the members constituted a club, then if the members of the executive committee of the club who entered into or caused to be entered into a contract with the plaintiffs, such members would be jointly liable on the contract. And under the practice prior to the Judicature Act, if all the co-contractors to a joint contract were not sued, those who were sued might, on filing an affidavit that there was another, or that there were other co-contractors, who was, or were, resident within the jurisdiction,

plead such non-joinder in abatement. If such plea was not pleaded, the plaintiff could recover against one of the joint contractors on proof of a joint contract: Collyer on Partnership, Am. ed. of 1878, sec. 721. The effect is the same since the Judicature Act, unless the party sued moves on the usual affidavit for leave to add his co-contractors as parties defendant. See as to the present practice note book of Osler, J. A., for a summary of the judgment of the Court of Appeal in *Shaw v. Tassie** (not reported).

* SHAW V. TASSIE.

THIS was an appeal by the plaintiff from an order of the Queen's Bench Divisional Court setting aside the judgment of MACMAHON, J., in favour of the plaintiff, and directing a new trial.

The action was brought against the president of an unincorporated agricultural society to recover money lent upon a mortgage to the society. The mortgage was executed in the name of the society as if it were an incorporated company. There was some evidence that the defendant was to be personally responsible for the money, and the negotiations for the loan were carried on by him, and the cheque for the amount advanced was made payable to and indorsed by him. The action was founded upon the liability of the defendant as acting on behalf of a non-existent body, or, alternately, as a member of an association or partnership.

The appeal was argued before HAGARTY, C. J. O., and BURTON, OSLER, and MACLENNAN, JJ. A., on the 20th March, 1896.

M. Wilson, Q.C., for the appellant.

Watson, Q.C., for the defendant.

At the close of the argument judgment was given allowing the appeal with costs and restoring the judgment of MACMAHON, J.

The following reasons were given by

OSLER, J. A.—1. There is evidence, which the trial Judge, having regard to the credibility of the respective witnesses, believed, that the money was lent on the personal responsibility of the defendant. It was lent, it may be conceded, to the agricultural society, and yet the defendant may have made himself personally responsible for it, apart from the implied liability arising from the fact that that society turned out not to be an incorporated one. I see no just ground for reversing the judgment, putting it on that ground alone.

2. The defendant is sued personally for the debt—for money lent. The defendant pleads, in effect, "never indebted," denying that he borrowed the money, and also the fact that it was lent to the society. The latter was a wholly needless thing to do, being a mere incident to the other part of the defence, that he had not himself been the borrower.

The appeal, I consider, should be dismissed on the terms and with the condition thereto annexed mentioned in the judgment of his Lordship the Chief Justice.

If by that statement he meant to assert that the money was lent to a corporation—an incorporated company—the defence was not proved. If he meant that it was lent to an unincorporated company, he has not said so. Had he pleaded that it was lent to an unincorporated company, the other members of which were all jointly liable with himself, I do not see how that would have been a defence under the present practice. It would have been the subject of a plea in abatement under the former practice, but now, instead of so pleading, the defendant should have moved to compel the plaintiff to add, or for leave to add, these other parties as defendants. If he does not choose to do that, there is nothing now, more than there was before, to prevent the plaintiff from recovering against the one joint contractor, on proof of the joint contract.

I do not see how the defendant is really prejudiced further than that he has not had all his co-debtors made parties to this action, for it is impossible to contend that his rights against them are affected by the judgment. For not having brought them in and made them parties, he has only himself to thank. He is in the same position as a joint contractor who had not pleaded in abatement formerly was, but it would be a grievous injustice to the plaintiff were he compelled to try the case over again merely to give the defendant an opportunity of retrieving his position. If he had not known throughout the position of the society as being an unincorporated one, there might have been some appearance of justice in granting a new trial in order to enable him to apply to add as co-defendants persons whose joint liability had been disclosed for the first time at the trial ; but, as the case stands, the plaintiff has a right to say, "I have succeeded on the finding as to your personal liability, apart from your liability as a member of the society ; and also upon your liability in the latter character, as you have not chosen to make your associates parties defendants to the action." The contention of the defendant seems to be that the plaintiff is bound to set forth a joint contract in his statement of claim, even if he is suing only one of the joint contractors ; but I do not think that is the law under the modern practice any more than it formerly was. He must still "give the plaintiff a better writ," though he now does it by a motion on his own behalf to add his co-contractors, instead of by a plea in abatement.

The judgment must be reversed, with costs to the plaintiff throughout.

RENNIE V. BLOCK.

Costs—Taxation—Chambers Motion—Copies of Depositions.

In taxing the costs of a motion in Chambers, no allowance can be made for copies of depositions taken for use upon the motion.

[December 14, 1896.—*Street, J.*]

AN appeal by the plaintiff from the taxation, by one of the taxing officers at Toronto, of the costs of the Quebec Bank, garnishees, of and incidental to a garnishing application made in Chambers by the plaintiff, which costs the plaintiff had been ordered to pay.

One of the grounds of the appeal was that the officer had improperly taxed to the bank the costs of copies of depositions of persons examined as witnesses upon the application while it was pending.

The appeal was argued before STREET, J., in Chambers, on the 14th December, 1896.

O'Donohoe, Q. C., for the plaintiff.

D. T. Symons, for the Quebec Bank.

Judgment was delivered at the close of the argument.

STREET, J.—The appeal must be allowed as to the costs of the copies of depositions. There is no item in the tariff under which such costs can be taxed. Indeed, copies of depositions are of no use in any case except for the purpose of a brief; and, as no brief is allowed upon a Chambers motion, I do not see how these costs can be taxed.

KATRINE LUMBER COMPANY

V.

LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

Particulars — Pleading — Fire Insurance — Proofs of Loss — False and Fraudulent Statements.

The defence to an action to recover the loss alleged to have been sustained by the plaintiffs by the destruction by fire of property insured by the defendants was that the plaintiffs' claim was vitiated by the 15th statutory condition to which the defendants' policies were subject, because of the following false and fraudulent statements in a statutory declaration forming part of the proof of loss : (1) that the fire originated at a specified time from the embers of a previous fire upon the same premises ; (2) that the fires were not caused by the wilful act or neglect, procurement, means, or contrivance of the manager or any officer of the plaintiffs ; (3) that the schedules attached to the declaration contained as particular an account of the loss as the nature of the case permitted, and that such account was just and true.

Upon an application for particulars :—

- Held*, that the plaintiffs were entitled to know what acts of omission or commission the defendants intended to charge the plaintiffs' manager with as constituting the negligence imputed to him, and in what way it was charged that the fires were caused by his procurement, means, or contrivance.
2. That as to the origin of the fire, the statement that it did not occur at the time and in the way stated, and that the untrue statement was made with intent to defraud the defendants, was sufficient information to give the plaintiffs, and the defendants could not be required to give further particulars without disclosing their evidence merely.
 3. Nor should further particulars be required as to how the declaration that the fire was not caused by the wilful act of the manager was false and fraudulent. The statement that the fire was caused by his wilful act was sufficient.
 4. That as to the alleged falsity and fraud of the declaration with respect to the extent of the loss, it was sufficient for the defendants to say that the plaintiffs had overstated by a specified sum the loss on the whole of the articles insured, without saying by how much the plaintiffs had overstated the loss on each of the classes of articles.

[December 15, 1896.—*Meredith*, C.J.]

APPEAL by the defendants from an order of the Master in Chambers, dated the 16th and 20th November, 1896, requiring them to deliver further and better particulars.

The action was brought to recover the loss alleged to have been sustained by the plaintiffs by the destruction and damage by fire of a mill and other buildings, and a stock of lumber, shingles, lath, and slabs, against which the defendant company had insured the plaintiff company by the policies sued on.

The defence set up was that the plaintiffs' claim was vitiated by the 15th statutory condition to which the policies were subject, because of the following statements in a statutory declaration forming part of the proof of loss being, as they were alleged to be, false and fraudulent: (1) that the fire therein referred to originated between the hours of two and four o'clock p.m., on the 8th May, 1896, and that it originated from the embers of a fire which burned down the mill belonging to the plaintiff company upon the same premises, on the previous night; (2) that the said fires were not, nor was either of them, caused by the wilful act or neglect, procurement, means, or contrivance of the said J. J. C. Thompson (the plaintiff company's manager) or any officer of the plaintiff company; (3) that the schedules attached to the declaration of J. J. C. Thompson contained as particular an account of the loss of the plaintiff company as the nature of the case permitted, and that the said account was just and true.

By an order dated the 20th October, 1896, the defendant company were ordered to furnish particulars setting forth wherein and in what respects the statements of Thompson in the statutory declaration referred to were false and fraudulent.

The particulars were furnished by the defendants as follows:

"1. The defendants say that the false and fraudulent statements referred to in the 9th paragraph of the statement of defence are the statements set forth in the 8th paragraph of the statement of defence, under the headings "*a*" and "*b*" respectively.

"2. The defendants say that the said statements were false and fraudulent in this respect, that the said J. J. C. Thompson therein falsely stated that the said fire originated from the embers of a fire which burned down the mill belonging to the plaintiff company upon the same premises, upon the previous night; and also in this respect, that the said J. J. C. Thompson therein falsely stated that the said fires were not, nor was either of them, caused by the wil-

ful act of the said J. J. C. Thompson ; and also in respect of the statement therein contained that the said fires were not, nor was either of them, caused by the neglect of the said J. J. C. Thompson ; and also in respect of the statement therein contained that the said fires were not, nor was either of them, caused by the procurement, means, and contrivance of the said J. J. C. Thompson.

"3. The statements referred to in the 10th paragraph of the statement of defence are false in this respect, that the total quantity of lumber, lath, shingles, and slabs is falsely stated in the schedule marked "A," therein referred to, at a larger amount than was, in fact, destroyed by the said fire, to the extent of at least \$8,000 in value, at the prices therein stated. The defendants are unable to specify in detail the items erroneously stated in said schedule, which was made up entirely by the plaintiffs for their own purposes, and it is impossible for the defendants to trace or in any way identify the said items.

"4. The statements referred to in the said 10th paragraph of the statement of defence are also false in this respect, that the mill property insured by the interim fire receipt No. 58, in the statement of claim referred to, was fraudulently overvalued by the statutory declaration in the 5th paragraph of the statement of defence.

"5. The statements referred to in the said 10th paragraph of the statement of defence are also false in this respect, that the store property referred to in the 6th paragraph of the statement of claim was fraudulently overvalued by the statutory declaration therein referred to."

The plaintiffs then applied for further and better particulars, and on that application the order appealed from was made ; by it the defendant company were required within five days to deliver to the plaintiffs "further and better particulars under paragraph 6 of the statement of defence, (a) setting forth specifically particulars as to in what respect the statement made in the statutory declaration referred to in the said paragraph 6, and set forth in

paragraph 5 of the said statement of defence, that the fire therein referred to as having originated between the hours of two o'clock and four o'clock p.m., on the 8th of May, 1896, originated from the embers of a fire which burned down the mill belonging to the plaintiff company, upon the same premises, on the previous night, was falsely and fraudulently made by J. J. C. Thompson, in the said paragraph referred to.

“(b) Setting forth fully and specifically wherein the statement made in the said declaration, that the said fires were not, nor was either of them, caused by the wilful act of the said J. J. C. Thompson, was and is false.

“(c) Wherein the statement made in the said statutory declaration, that the said fires were not, nor was either of them, caused by the neglect of the said J. J. C. Thompson, was and is false.

“(d) Wherein the statement made in the said statutory declaration, that the said fires were not, nor was either of them, caused by the procurement of the said J. J. C. Thompson, was and is false.

“(e) Wherein and in what respects the statement made in the said statutory declaration, that the said fires were not, nor was either of them, caused by the means or contrivance of the said J. J. C. Thompson, was and is false.

“Further and better particulars under the 7th paragraph of the said statement of defence, setting forth fully and specifically the aggregate quantities of each of the classes of lumber, namely, lumber, lath, shingles, and slabs, in the schedules to the said statutory declaration, which it is alleged by the defendants are false, and by what aggregate amounts they are in excess of the amounts of lumber of such classes which were in fact destroyed by the said fires.”

The appeal was argued before MEREDITH, C. J., in Chambers, on the 30th November, 1896.

W. M. Douglas, for the defendants.

R. McKay, for the plaintiffs.

Newport, etc., Co. v. Paynter, 34 Ch. D. 88; *Briton Medical Association v. Britannia Fire Association*, 59 L. T. N. S. 888; *Hennessy v. Wright*, 57 L. J. Q. B. 594; *Temperton v. Russell*, 9 Times L. R. 319; and *Crabbe v. Hickson*, 14 P. R. 42, were referred to.

Judgment was delivered on the 15th December, 1896.

MEREDITH, C. J.—(after setting out the facts as above)—Upon the argument a number of cases were cited, but none seems to me to apply as nearly to the facts of this case as does the case of "*The Rory*," 7 P. D. 117. There the action was by cargo-owners against ship-owners, for delivery of the cargo in a damaged condition, and the statement of claim alleged that the damage was not occasioned by any of the excepted perils mentioned in the bill of lading, but was occasioned by the defective condition of the vessel or by the negligence or breach of duty or contract of the defendants, their servants or agents.

The defendants applied for an order for particulars of the defendants' negligence and breaches of duty or contract alleged in the statement or claim, and an order was made by the registrar that the plaintiffs should deliver to the defendants particulars of the defects rendering the *Rory* not reasonably fit to carry her cargo. The order was reversed on appeal, but on appeal to the Court of Appeal it was restored.

The Lord Chief Justice (Coleridge) and Lord Justice Brett, in delivering their judgments, discussed the reason for and the purpose of the practice of ordering particulars, and pointed out the unfairness of requiring the defendants to go to trial without any information as to what defects in the vessel the plaintiffs relied on as making it unfit for the carriage of the cargo, and the Lord Justice asked, "How are the defendants to meet the case contained in the 8th paragraph of the statement of claim? Do the plaintiffs mean by what is there stated that there was a defect in the construction of the ship, or that there was not a

proper crew, or that the master was drunk, or that he did not put the hatches down when there was a storm?" And an observation of the Lord Chief Justice is particularly apposite to one of the arguments of Mr. Douglas. He says: "If it" (the defective condition) "be only an inference they draw from the state in which the cargo was when it arrived, let them say so, but they are bound to communicate what they know, and if at any other time before the trial they should obtain any other knowledge of any matter occasioning the damage on which they should wish to rely, they should give it to the defendants, by amending the particulars, which they might do from time to time as they should obtain fresh information on the subject."

The particulars delivered by the defendants in this case are, in my opinion, as insufficient in some respects for the purpose of giving reasonable information as was the statement of claim in the case I have referred to. How are the plaintiffs to know what acts of omission or commission the defendants intend to charge Thompson with as constituting the negligence imputed to him, or in what way is it charged that the fires were caused by his procurement, means, or contrivance? It would, I think, be manifestly unfair to require the plaintiffs to meet at the trial such a defence as the defendants have set up, without further information on these points.

The particulars delivered are, however, in my opinion, sufficient in some respects, without being supplemented as the Master in Chambers has required them to be supplemented.

I do not see how the defendants can be required to give, without disclosing their evidence merely, further particulars as to the alleged false and fraudulent character of the statement as to the origin of the fire. The declaration of Thompson is that it occurred at a specified time and in a specified way. The defendants say that that declaration is untrue, that is, that the fire did not occur at the time and in the way stated, and that the untrue statement was made fraudulently, that is, with intent to defraud the

defendant company. It seems to me that the information afforded the plaintiffs on this branch of the defence is sufficient. Nor should further particulars have been required as to how the declaration that the fire was not caused by the wilful act of Thompson was false and fraudulent. The defendants say, in effect, that the fire was caused by the wilful act of Thompson, and that is, I think, sufficient.

The particulars delivered of the alleged falsity and fraud of the declaration as to the extent of the loss are also, I think, sufficient. The defendants, in effect, say, "we cannot say by how much you have overstated the loss on each of the classes of articles, but we undertake to shew that you have overstated the loss on the goods and chattels insured as a whole by \$8,000, and that overstatement was fraudulently made."

The result is that the order of the Master in Chambers ought, in my opinion, to be varied by limiting the further particulars which the defendants are required to furnish to the particulars mentioned in the sub-divisions numbered *c*, *d*, and *e* of the order.

The costs of the appeal will be costs in the cause.

CAMPAU V. RANDALL.

Notice of Trial—Irregularity—Close of Pleadings—Order Staying Proceedings—Chambers' Motion—Reference to Trial Judge—Order—Judgment—Appeal.

On the 21st March, 1896, the defendant appeared, delivered a defence, and served an order for security for costs, which imposed a stay of proceedings. On the 2nd October, 1896, the plaintiff complied with the order by filing a bond, and on the 3rd October gave notice of trial:—*Held*, that the notice of trial was irregular, the pleadings not being closed when it was given.

A motion made in Chambers by the defendant to set aside the notice of trial was referred to the Judge at the trial, who dismissed it. The defendant thereupon withdrew, and the action was tried in his absence and judgment given for the plaintiff:—

Held, that the Judge, when disposing of the motion, was sitting and acting as a Judge of Assize, and that this and the trial of the cause might properly be deemed one proceeding; and one appeal, comprehending all, was sufficient.

[December 12, 1896.—*Divisional Court.*]

AN appeal by the defendant to a Divisional Court from an order of ARMOUR, C. J., made at the Assizes at Sandwich, on 14th October, 1896, refusing to set aside a notice of trial served by the plaintiff on the 3rd October, 1896, and also from the order or direction of ARMOUR, C. J., of the same date, for the entry of judgment for the plaintiff with costs. The notice of appeal was served on the 24th October, 1896, returnable on the 2nd November, 1896. The appeal was twice enlarged before it came on for argument.

The action was upon a foreign judgment, and was begun on the 9th March, 1896. The plaintiff's residence was out of the jurisdiction. On the 21st March, 1896, the defendant entered an appearance, delivered his statement of defence, and issued and served an order requiring the plaintiff to give security for costs. This order was in the usual form, and required the plaintiff to give security within four weeks, stayed all further proceedings in the meantime, and directed that, in default of such security being given, the action should be dismissed with costs. Nothing further was done in the action until the 2nd October, 1896, when the plaintiff filed a bond as security for

the defendant's costs. On the 3rd October, 1896, the plaintiff gave notice of trial for the Assizes at Sandwich beginning on the 13th October, 1896. The defendant made a motion to set aside the notice of trial as irregular, before a local Judge, who referred it to the Judge presiding at the Assizes. The motion was heard by ARMOUR, C. J., at the Assizes, and was dismissed. The defendant and his counsel then withdrew, and the trial proceeded in their absence, and judgment was given for the plaintiff with costs.

The appeal from the order and judgment of the trial Judge was argued before BOYD, C., and FERGUSON and ROBERTSON, JJ., on the 25th November, 1896.

L. G. McCarthy, for the defendant. The stay of proceedings was not removed by the filing of the bond. The bond must be perfected before the stay is removed. A bond is not perfected until it is allowed upon motion or by lapse of fourteen days from notice of filing: Rule 1378. The notice of trial should have been set aside as irregular, because it was served while the stay of proceedings was in force. But, if that is not so, at all events the notice of trial was irregular, because the pleadings were not closed when it was given: Rule 654. No joinder of issue was served, and the pleadings could not be closed, at the earliest, until the expiry of three weeks from the 2nd October: Rule 392; *Piper v. Benjamin*, 17 P. R. 267. See also *Doer v. Rand*, 10 P. R. 165; *Re Union Fire Ins. Co.*, 7 A. R. 783; *Bank of Nova Scotia v. La Roche*, 9 P. R. 503, 508.

Wallace Nesbitt, for the plaintiff. The last case cited, was not followed in *Anglo-American Casings Co. v. Rowlin*, 10 P. R. 391. The defendant's appeal from the order refusing to set aside the notice of trial is too late. That was a Chambers order, and notice of appeal should have been served within four days, returnable within ten days: Rule 1490 (b). The time for closing the pleadings ran against the defendant, notwithstanding the stay of pro-

ceedings, and so the pleadings were closed when the notice of trial was served : *La Grange v. McAndrew*, 4 Q. B. D. 210. See also Snow's Annual Practice, 1896, p. 1102 ; Rule 477 (O.). I admit that if the time did not run pending the giving of the bond, the pleadings were not closed.

McCarthy, in reply. If there is anything in the objection that the appeal is late, it has been waived by enlargements. *La Grange v. McAndrew*, 4 Q. B. D. 210, is not authority for the proposition that the time runs for pleading when the proceedings are stayed : see Wilson's Judicature Acts, 3rd ed., p. 411.

Judgment was delivered on the 12th December, 1896.

BOYD, C.—The order for security stays all proceedings from the day of service till the day when security is given. There would be, therefore, a stay in this case from 21st March, when the order was served, till 2nd October, when the bond was filed. The defendant had filed his defence on the same day as the plaintiff filed the bond, but the time for joining issue or other pleading thereto by the plaintiff would not run till the 3rd October. On that day notice of trial was served, which appears to be premature and irregular. The motion to set this aside was enlarged before the trial Judge, and by him dismissed, and judgment thereafter entered for the plaintiff. It is admitted by the plaintiff that if the time did not run pending the filing of the bond, the pleadings were not in a proper state to proceed to trial ; and that conclusion appears to be inevitable under the practice. No joinder of issue was filed by the plaintiff, and failing that, a three weeks' lapse of time is needed before the pleadings can be deemed to be closed : Rules. 381, 392, 654, 477, 1378 ; *Donnelly v. Jones*, 4 Ch. Chamb. R. 48, 52 ; *Schneider v. Proctor*, 9 P. R. 11 ; *Fox v. Blew*, 5 Mad. 147.

This is not a Chambers appeal under Rule 847, but has become part of the proceedings at the trial, as to the whole of which an appeal lies to the Divisional Court : *Schultz v.*

Wood, 6 S. C. R. 585. The judgment should be vacated, and the notice of trial set aside with costs to the defendant, to be set off against the debt of the plaintiff.

FERGUSON, J.—The action was commenced on the 9th day of March last. The plaintiff was and is resident out of the jurisdiction. The order for security for costs was made on the 21st day of March. The statement of defence was, as stated at the bar, filed and served on the 21st day of March. This document, however, bears date the 20th day of March.

The order for security for costs had the effect of staying proceedings until the security should be given. The bond for and as security was filed on the 2nd day of October. and it may be assumed that notice of this fact was duly given. I do not see that Rule 477, providing that the day on which an order that the plaintiff do give security for costs is served, and the time thenceforward until and including the day on which security is given, is not to be reckoned in the computation of time allowed to a defendant to appear or deliver a defence, has any application in the present case. The defendant had delivered his defence on the day the order for security was made.

Rule 381 provides that a plaintiff shall deliver his reply within three weeks after the defence, or the last of several defences, shall have been delivered. I do not see any authority for saying that the plaintiff could or should have filed a joinder of issue or other reply before security given by the defendant. No joinder of issue or reply was in fact filed, and I think the stay operated so as to prevent this being done earlier than the giving of the security. The notice of trial was given on the 3rd day of October. Reading Rule 392, so far as applicable to this case, it provides that as soon as either party has joined issue simply, or the time for delivering a reply on subsequent pleading or demurrer has expired, the pleadings, as between such parties, shall be deemed to be closed.

In the circumstances above stated, I think the lapse of

three weeks after the giving of the security was required before the pleadings could be properly deemed to be closed ; no part of such three weeks having passed after the delivery of the defence, and before the stay of proceedings by making the order for security.

Rule 654 provides that after the close of the pleadings, either party may give notice of trial, etc. I think the notice of trial in the present case was bad or irregular, as being given before the close of the pleadings.

A motion against this notice of trial was made in Chambers for the purpose of setting it aside. This motion was referred to the trial Judge to be disposed of, and at the trial the learned Judge refused the motion, and thereupon the defendant's counsel withdrew from the case, and after evidence being given by the plaintiff, judgment was ordered to be entered for the plaintiff and against the defendant, there being no jury.

I think the learned Judge, when disposing of the motion (referred to him) to set aside the notice of trial, was sitting and acting as Judge of Assize ; and that this and the trial of the cause may properly be deemed one proceeding. If so, the one appeal, comprehending all, is sufficient. This appeal does comprehend all, and I think it should succeed, and that the judgment should be vacated. I agree as to the disposition of costs.

ROBERTSON, J.—I concur.

SMITH ET AL. V. EGAN.

Receiver—Equitable Execution—Share in Estate of which Execution Debtor is Administrator—Injunction.

At the instance of execution creditors, a receiver was appointed to receive the debtor's share of his deceased wife's estate, of which he was the administrator; and an injunction was granted restraining him from transferring, incumbering, or dealing with his share.

[November 10, 1896.—*Street, J.*]

THIS was a motion made on behalf of the plaintiffs, who were judgment creditors of the defendant, for the appointment of a receiver for the purpose of realizing by way of equitable execution the amount of their judgment debt out of the defendant's share of his wife's estate, and for an injunction restraining him from dealing with the share.

The defendant was administrator of his deceased wife's estate, and, as such administrator, was entitled to have paid over to him the insurance moneys payable on a building belonging to the estate which had been destroyed by fire, and of which moneys it was alleged the defendant was entitled individually to a half share.

The motion was heard by STREET, J., in Court, on the 10th November, 1896.

G. M. Macdonnell, Q.C., for the motion.

Douglas Armour, contra.

Judgment was delivered at the close of the argument.

STREET, J.—I think the plaintiffs are entitled to the order for the appointment of a receiver, and to an injunction restraining the defendant from transferring, incumbering, or dealing with his share of his wife's estate until the further order of the Court.

George Smith, one of the plaintiffs, is to be appointed such receiver on the consent of his co-plaintiffs to his

appointment being filed, and on their undertaking to answer for his acts.

The costs of the motion are to be added to the amount of the plaintiffs' claim.

BOYD V. SPRIGGINS.

Affidavit—Notary—Seal.

An affidavit for use in the Court sworn before a notary public in Ontario should be authenticated by his official seal.

[January 16, 1889.—*Boyd, C.*]

AN affidavit sworn before a notary public in Ontario was tendered for filing in the office of the Accountant of the Supreme Court of Judicature for Ontario, unauthenticated by the notary's seal.

BOYD, C., on being consulted by the Accountant, was of opinion that an affidavit sworn before a notary under R. S. O. ch. 153, sec. 4, should not be received unless authenticated by his seal of office.

[This ruling has since been acted upon in the Accountant's office. In a case of *Re Ryan, Ryan v. Sutherland*, however, an opposite opinion was expressed by STREET, J., on the 14th December, 1896, upon a motion made by the plaintiffs *ex parte* for a direction to the Accountant to receive and file an affidavit sworn before a notary and not sealed. Upon that application the following authorities were cited by *W. E. Middleton*, for the plaintiffs:—Brooke's Office of a Notary, 5th ed., pp. 44, 47; Ford on Oaths, pp. 49, 50; R. S. O. ch. 153, secs. 3-6; R. S. O. ch. 114, sec. 41; R. S. O. ch. 61, sec. 34; but the ruling in *Boyd v. Spriggins* was not referred to. STREET, J., on that ruling being subsequently brought to his attention, after consultation with the Chancellor, expressed his concurrence in the Chancellor's view, and withdrew his direction, which had not been acted upon.]

JOHNSTON V. TOWN OF PETROLIA ET AL.

Appeal—Court of Appeal—Cross-Appeal—Notice—Rule 825—Time—Signing of Judgment—Rule 804—Extension of Time.

In an action brought against three defendants for damages for pollution of a stream, judgment was given at the trial for the plaintiff against one defendant, and the action was dismissed against the other two:—

Held, that, upon the appeal of the first defendant to the Court of Appeal, the plaintiff, the respondent, could not maintain a cross-appeal against the other defendants by way of notice under Rule 825, but must proceed by way of an independent appeal.

Freed v. Orr, 6 A. R. 690, not followed.

Re Cavender's Trusts, 16 Ch. D. 270, followed.

Under Rule 804, the time for service of notice of appeal runs from the day on which the judgment appealed against is actually signed or entered, and not from the day upon which it is pronounced.

Time for giving notice of appeal extended where the party proposing to appeal had from the first shewn his intention to appeal, but had been under a misapprehension as to the practice, and no session of the Court had been lost.

[January 4, 1897.—*Osler*, J. A.]

MOTION by the plaintiff for leave, notwithstanding the lapse of time, to serve notice and reasons for appeal from the judgment of MEREDITH, J., to the Court of Appeal, upon the defendants the Imperial Oil Company and Fairbank, Rogers, & Co., as against whom the action had been dismissed. The judgment was in favour of the plaintiff as against the defendants the corporation of the town of Petrolia, who had begun an appeal therefrom.

The facts are stated in the judgment.

The motion was argued before OSLER, J.A., in Chambers, on the 19th December, 1896.

W. R. Riddell, for the plaintiff.

W. Cassels, Q. C., for the defendants the Imperial Oil Company.

McCarthy, Q. C., for the defendants Fairbank, Rogers, & Co.

Judgment was delivered on the 4th January, 1897.

OSLER, J. A.—The plaintiff sued these three defendants in the same action, alleging that they, or one or more of

them, had constructed numerous drains and sewers in the town of Petrolia and its vicinity, by means of which they had brought down large quantities of sewage, oil, salt water, refinery refuse, and other foul and noxious substances into the waters of Bear creek, and had thereby polluted the waters of the creek, which flowed through the plaintiff's land, and which the plaintiff was entitled to use and enjoy free from such pollution.

An injunction was claimed and damages against all the defendants.

At the trial before Meredith, J., the action was dismissed against the defendants other than the town of Petrolia, by whom the drains had been constructed, which the other defendants used. As against the town, an injunction was granted on certain conditions, and damages were assessed at \$50.

Judgment was delivered on the 25th September, 1896. On the 23rd October notice of appeal therefrom was given by the town of Petrolia for the sittings of the Court of Appeal commencing 10th November, 1896.

On the 5th November the plaintiff served his reasons against appeal, and, having been advised that he was entitled to do so under Rule 825* (of 1st January, 1896), claimed by way of cross-appeal that the judgment at the trial in favour of the other defendants should be varied by converting it into a judgment against them also for an injunction and damages.

On the 5th December, on motion made before me on behalf of these defendants, the service upon them of the reasons against appeal and cross-appeal was set aside on the ground that the case was not one to which Rule 825 applied, the plaintiff having no right to cross-appeal under that rule against defendants who had succeeded in the

* A cross-appeal shall not under any circumstances be necessary, but if a respondent intends upon the hearing to contend that the decision should be varied, he shall, in his reasons against the appeal, give notice of such contention to any parties who may be affected by such contention, and shall concisely state the grounds of such contention. * * *

action, which, as against them, was an independent action, in no way bound up with or dependent upon the success or failure of the action against the town.

In the meantime, viz., on the 16th November, judgment had been signed or entered in the action.

On the 9th December notice of motion was served on behalf of the plaintiff upon the defendants who had succeeded in the action for leave to serve notice and reasons of appeal from the judgment in their favour, "notwithstanding the lapse of time." This motion came on to be heard before me on the 19th December, and is now to be disposed of.

As some misapprehension appears to exist in the profession as to the application of Rule 825, under which the plaintiff had proceeded in attempting to appeal by way of cross-appeal against these defendants in the appeal by the town, I may here explain my reasons for setting aside the service of the reasons of appeal and cross-appeal upon them, although I was of opinion that the practice had for many years been so well settled that I did not reserve judgment on the former motion, giving my reasons orally at the conclusion of the argument. The plaintiff, respondent in the appeal by the town of Petrolia, relied upon the decision of this Court in *Freed v. Orr*, 6 A. R. 690, 700, (20th May, 1881), in support of his right to bring in the other defendants by notice under Rule 825, formerly General Order 16 of the Orders of the Court of Appeal, 30th March, 1878. That decision was pronounced upon an interlocutory objection taken by the defendants there brought in, upon the argument of the principal appeal, and, although no reasons for the judgment are reported, it may perhaps be said to be in favour of the procedure adopted by the plaintiff in this case; but the [practice which has obtained since that decision is that laid down by the Court of Appeal in England in *Re Cavander's Trusts*, 16 Ch. D. 270, in construing Order 58, Rule 6, which in terms may be said to be the same as our own Rule 825. Jessel, M. R., speaking for the Court, says: "The terms of the

latter part of this Rule are very wide, but looking at the former part, it is evident that it was only intended to make the notice a substitute for a cross-appeal, and an appeal on a point which does not affect the original appellant cannot be a cross-appeal. The notice may affect other parties also, and if so it must be served upon them, but it cannot have been intended to enable a respondent to bring forward in this way a case with which the appellant has nothing to do. If he has a case of that kind, he must give a notice of appeal."

In the case before me the appellants the town have no interest whatever in the judgment against the other defendants, nor have they any interest in the plaintiff's, the respondent's, judgment against the town, and therefore it seemed to me perfectly clear that it was a case in which the plaintiff, if he desired to reverse or vary that judgment, must proceed by way of an independent appeal. Except as a matter of strict practice and the construction of the Rule, the question would appear to have lost most of its importance since the practical abolition of the right to security for the costs of the appeal, as it can now be of little consequence to the party whether he is brought in by notice under Rule 825, or by an original notice of appeal.

Then, as regards the present motion for leave to extend the time for giving notice of appeal, the position is a curious one. The appellants the town of Petrolia served their notice of appeal and reasons against appeal before they were regularly in a position to do so. Rule 804 provides that "the appeal shall be set down for the first day of the sitting of the Court of Appeal commencing after the expiration of one month from the date on which judgment has been signed. * * The notice shall be served within one month after the judgment complained of, * * and not less than seven clear days before the first day of the sittings at which the appeal is to be heard."

If the notice of appeal, *i.e.*, the notice of motion mentioned in the first part of this Rule, must specify, as I

think it necessarily must, the sittings of the Court at which the appeal is to be brought on, no provision being made for any further notice, then it cannot regularly be given until the judgment has been signed, and that is the date from which the time for service of the notice of appeal runs, not the date at which judgment happened to be given by the trial Judge.

Here, the appellants the town of Petrolia took the latter date, viz., 25th September, and served their notice of appeal on the 23rd October, for the November session of the Court of Appeal. The correct date, in my opinion, was the 16th November, when judgment was actually signed; and when the plaintiff, on the 9th November, no doubt under the same impression as his opponents had been as to the meaning of the Rule, served the notice of the motion now before me for extension of time, he was still in time to have served notice regularly without leave. No doubt, the time had expired when the motion came on to be heard, and leave is now necessary; but I think, under the circumstances, it ought to be given, as the plaintiff has all along shewn that his intention was to appeal, first, by serving notice of cross-appeal, and next, by serving the present notice of motion for leave at a time when he was really in a position, had he known it, to have served a good notice without leave. No session of the Court has been lost, for his appeal may be set down for the January Court, which is the earliest Court for which it could have been regularly set down.

I make no order as to the costs of this application, for reasons which will readily occur to the parties.

HENDERSON V. CANADA ATLANTIC RAILWAY COMPANY.

Discovery—Examination of Officer of Railway Company—Flagman.

A flagman in the employment of a railway company whose duty it is to give notice of danger to persons intending to cross a line of railway at a particular place, he being under the superintendence of the yard foreman, is not an officer of the company examinable for discovery at the instance of the plaintiff in an action against the company to recover damages for injuries sustained through the alleged neglect of the flagman to give notice of danger.

[January 13, 1897.—*Ferguson, J.*]

AN appeal by the defendants from an order of Mr. Cartwright, an official referee, sitting for the Master in Chambers, allowing the plaintiff to examine for discovery, as an officer of the defendants, a flagman in their employment.

The action was for damages for the alleged negligence of the defendants in not warning the plaintiff of the approach of a train at a point in a highway crossed by the defendants' railway in the city of Ottawa, whereby the plaintiff alleged that he suffered injury and loss; and the flagman whose examination was sought was the person stationed at the crossing to give notice of danger to persons intending to cross the railway. It was shewn that the flagman was under the superintendence of the yard foreman.

The appeal was argued before FERGUSON, J., in Chambers, on the 11th January, 1897.

D. L. McCarthy, for the defendants, cited *Leitch v. Grand Trunk R. W. Co.*, 13 P. R. 369; *Knight v. Grand Trunk R. W. Co.*, *ib.* 386; *Leach v. Grand Trunk R. W. Co.*, *ib.* 388, 467; *Fowle v. Canadian Pacific R. W. Co.*, 13 P. R. 413; *Thomas v. Grand Trunk R. W. Co.*, 12 C. L. T. Occ. N. 42; *Webster v. City of Toronto*, 15 P. R. 21; *Odell v. City of Ottawa*, 12 P. R. 446.

R. McKay, for the plaintiff, relied on *Leitch v. Grand Trunk R. W. Co.*, 12 P. R. 671 (affirmed by division of opinion in the Court of Appeal, 13 P. R. 369), and referred

especially to the remarks of ARMOUR, C. J., at pp. 672-4, as to no definite distinction being drawn in the Railway Act between officers and servants.

Judgment was delivered on the 13th January, 1897.

FERGUSON, J.—The question on this appeal is whether or not a person in the employment of the defendants as a flagman, whose duty it was to flag and so give notice of danger to persons crossing or intending to cross the defendants' railway track at a particular place (he being under the superintendence of the yard foreman), is an officer of the defendants who may be examined by the plaintiff upon an examination now commonly said to be for "discovery."

I have taken occasion to examine all the cases on the subject in our own Courts, and I find the views expressed by different Judges much at variance. I do not think that any rule or guide can be fairly drawn from or is afforded by these decisions; and, not being able to perceive that any good can arise from my adding to what has already been written on the subject, I content myself by stating my opinion that this flagman is not an officer of the defendants, and, therefore, not liable to be so examined.

The appeal will be allowed. The costs will be costs in the cause.

RE BENFIELD AND STEVENS ET AL.

Interpleader—Jurisdiction—Mining Agreement—Construction—Lease or License—Foreigners—Foreign Debt.

Under an agreement with respect to a mining property in this Province, payment was to be made in a foreign country to foreigners residing therein, being second mortgagees in possession, by a person also residing therein, of a sum of money for each ton of ore mined by him. A large sum due under the terms of this agreement was claimed by the payees named in it, and also by the first mortgagee of the property, who was in the jurisdiction :—

Held, that the agreement was a mere license to mine, not conferring an exclusive possession of the property, and a mere agreement for the sale and purchase of the ore when mined ; and that the first mortgagee had no right of action for the money, but, at the most, only a claim for unliquidated damages for the wrongful removal of ore ; and the licensee was not entitled to an interpleader order :—

Held, also, affirming the decision of the Master in Chambers, 17 P. R. 300, that the Court had no jurisdiction to compel foreigners to come here with their claim and litigate it, the debt in question having no existence here.

Credits Gerundense v. VanWeede, 12 Q. B. D. 171, distinguished.

[January 13, 1897.—*Street, J.*]

THIS was an appeal by Thomas Benfield from the order of the Master in Chambers, *ante* 300, dismissing the appellant's application for an interpleader order, under the circumstances set forth in the judgment.

The appeal was argued before STREET, J., in Chambers, on the 13th November, 1896.

W. E. Raney, for Benfield, the appellant.

W. H. Biggar, for Richardson, a claimant.

J. Bicknell, for Stevens *et al.*, respondents.

Judgment was delivered on the 13th January, 1897.

STREET, J.—The claimant is first mortgagee of a certain mining property in this Province, as trustee to secure certain mortgage bonds given upon it by the Canada Consolidated Gold Mining Company. These bonds are now in default.

Stevens and Newberry, the respondents, are second mortgagees of the property, and, being in possession, they

entered into an agreement on 21st August, 1895, with the applicant, by which they gave him the right to mine upon the property, and he agreed to pay them, at the end of each half year during which the agreement should remain in force, the sum of twenty-five cents per ton for each ton of ore which should be mined by him during the half year upon the property, and he agreed with them that the quantity of ore so mined should never be less than 9,125 tons in any year; it was provided that payment for the ore should be made to the respondents at Detroit, where the agreement was made, and where they reside; the applicant resides in New Jersey; and the claimant, Richardson, is the only party to the proceedings who resides in this Province.

A sum of about \$2,250 is said to be due from the applicant to the respondents under the terms of the agreement, and he comes to the Court alleging that it is claimed from him by both the respondents and the claimant, and asks that he may be allowed to pay it into Court, and that the respondents and the claimant may be directed to settle as between themselves the ownership of it.

The respondents dispute the jurisdiction of the Court to compel them to come into a Canadian Court and to submit their right to its determination, urging that they are foreigners domiciled in their own country, and entitled to receive, in their own country, from one of their own countrymen, also domiciled there, the money in question, upon a contract entered into in that country.

I gather from the papers that the claimant rests his right to the money in question upon the ground that the applicant, Benfield, is in the position of a lessee under Stevens and Newberry of the mining property in question, and that the twenty-five cents per ton which he agreed to pay them is in fact a rent, to which the first mortgagee has entitled himself by the notices he has given to the original mortgagors, the Consolidated Canada Gold Mining Company, and to Stevens and Newberry, and by the proceedings he has taken against them to recover possession of the land.

If this position, viz., that Stevens and Newberry are lessors, and Benfield is lessee, cannot be maintained, then Benfield's right to an interpleader order entirely fails. I should not feel inclined to consider the construction of the instrument creating the debt, and to determine the positions of the parties to it, at this early stage of the proceedings, were it not that the question of jurisdiction may turn upon whether it is simply a license to take ore away at a certain sum per ton, or a lease of the property at a rent. In the one case the debt would be clearly one over which the American Courts would properly have jurisdiction; in the other it might be that the jurisdiction would more properly belong to the Courts of the country in which the land out of which the rent is payable is situate.

The agreement in question is dated 21st August, 1895. The respondents, Stevens and Newberry, are the parties of the first part, and the applicant, Benfield, is the party of the second part. It recites that the parties "desire to provide for the sale by the parties of the first part and the purchase by the party of the second part of ore to be mined by the party of the second part" from certain mining lands mentioned in an earlier recital; the parties of the first part then "agree to give and hereby do give to the said party of the second part the right to mine upon said mining lands *so long as the parties of the first part shall continue in possession of said mining lands*" * * "or so long as they shall have power * * to confer said right to mine upon said party of the second part * * and agree to sell to the said party of the second part all the ore that he shall mine upon said lands for the price of twenty-five cents for each ton," etc., etc. "The party of the second part agrees to purchase all the ore that he shall mine upon the said lands," and to pay therefor, at half yearly intervals, from the date of the agreement, at the city of Detroit.

"The party of the second part shall have the right to use any buildings or other structures possessed by the

parties of the first part, so long as the right of the parties of the first part to mine hereunder shall continue."

"The party of the second part covenants that he will mine not less than 9,125 gross tons of ore per year."

I think these are all the provisions of the deed throwing light upon the intention of the parties to it, and I think it is clear upon its terms, read in the light of the authorities, that it must be taken to be a mere license to mine certain ore upon the property, not conferring an exclusive possession of the property, and to be merely an agreement for the sale and purchase of the ore when mined: *Doe v. Wood*, 2 B. & Ald. 724; *Carr v. Benson*, L. R. 3 C. P. 525.

If I am right in my construction of the instrument, then I do not see how the applicant can support the claim that he has made to the money due from Benfield to Stevens and Newberry, nor how Benfield can support his application for an interpleader order in the absence of any right of action against him by anyone but Stevens and Newberry for the recovery of this money. The only possible claim that would then remain to the claimant, so far as I can see, against Benfield, would be one for unliquidated damages for the wrongful removal of ore after demand of possession. I can find no authority for allowing Benfield to hold the money he owes upon his contract with Stevens and Newberry for the purpose of indemnifying himself against such a claim on the part of Richardson. For such a situation the Interpleader Rules, at all events, do not provide a remedy: see *Ingham v. Walker*, 3 Times L. R. 448.

The same construction of the deed must, it appears to me, be also fatal to the application upon the ground of jurisdiction.

The case of *Credits Gerundouse v. Van Weede*, 12 Q. B. D. 171, was the case principally relied on by the applicant, and that case has certainly gone further, I think, than any other in the direction of extending the right of interpleader against foreigners.

The plaintiffs in that case were an English company,

who sued VanWeede in England, where he carried on business as agent for Don Pedro Jordi, a Spanish subject, living at Gerona, in Spain. The action was brought to recover certain corks in the possession of the defendant in England, which the plaintiffs claimed under an alleged assignment from Don Pedro Jordi. The defendant, being sued, applied for leave to serve an interpleader summons upon Don Pedro Jordi, in Spain, upon the ground that he claimed no interest in the casks, and that they were claimed from him by Jordi, as well as by the plaintiffs, and that Jordi would probably sue him for them. The Court gave the leave, basing the right to do so upon the ground that the order asked for did not assert any present jurisdiction over Jordi, or propose to compel him to submit to its process, but merely to give him notice of the proceedings being taken, so that, if he should decline to come in and submit to the jurisdiction, and should afterwards commence an action against VanWeede, he might be barred from continuing proceedings which would be harassing to the defendant as vexing him twice for the same cause of action.

In later cases it has been said that the principle of that case should not be extended; it is pointed out that the Courts have no right to order service of papers out of the jurisdiction without statutory authority, and that there is none in the case of interpleader proceedings: *Re Busfield*, 32 Ch. D. 123; *Weldon v. Gounod*, 15 Q. B. D. 622; *Ex p. Brandon*, 54 L. T. N. S. 128.

It would clearly be an extension of this principle, which the Courts say should not be extended, to hold it applicable to the present case. In that case the corks in dispute were in the possession of the defendant in England, and he was sued there for them by the plaintiffs in the action, so that, having within their jurisdiction beyond question the tangible subject-matter in dispute, they notified the foreigner that the corks which he claimed as his, being in England, were claimed there by the plaintiffs, and that, if he wished to assert his claim to them, he must come in

and do it in the interpleader proceedings, or take the consequences. Having the goods in England, the Courts there had complete jurisdiction over them according to the accepted principles laid down by the writers on international law: Dicey's Conflict of Laws, ed. of 1896, pp. 38, 384; Westlake's Private International Law, 3rd ed., pbs. 151 to 153.

In the present case, however, the subject-matter in dispute is a debt, which, upon the construction I have placed upon the agreement, is not a Canadian but an American debt, and which must be taken to be situate in the United States, for it arises upon a deed made there between two citizens of that country, and is payable there. Benfield is, therefore, asking that his creditors, Stevens and Newberry, shall bring their claim into this Province, in order that our Courts may determine whether they or some other persons are entitled to collect it. I think the answer to the application is that the debt has no existence here, and that we cannot compel the persons to whom it is payable to bring it here in order that we may make a determination which shall bind them. It is true that Benfield offers to bring into Court here a sum of money sufficient to answer the claim; but he cannot thus satisfy his contract, which is to pay that sum at the city of Detroit; he cannot, without the consent of his creditors, transfer the situation of the debt from the United States to another country.

Both upon the ground, therefore, that the applicant has shewn no jurisdiction in the Courts here to compel Stevens and Newberry to come here with their claim and litigate it, and upon the further ground that he has not shewn any ground upon which the claimant can demand the payment to him of the debt in question, I think the appeal should be dismissed.

Appeal dismissed with costs.

PARKES V. BAKER ET AL.

Security for Costs—Public Officer—59 Vict. ch. 18, sec. 7 (O.)—Pleading—Affidavits.

Where a person who holds a public office is made defendant in an action, the pleadings must be looked at to determine whether he is sued in his capacity of a public officer, and so entitled to security for costs under sec. 7 of the Law Courts Act, 1896; and if the pleadings are of such a character that the case cannot on them go to the jury against the defendant as a public officer, he cannot claim the protection of the statute, even where he shews by affidavits that his sole connection with the matters alleged against him was in his public capacity.

[January 15, 1897.—*Divisional Court.*]

AN appeal by the plaintiff from an order of FALCONBRIDGE, J., in Chambers, affirming an order of Mr. Cartwright, sitting for the Master in Chambers, requiring the plaintiff to give security for the costs of the defendant Northmore of this action, pursuant to sec. 7 of the Law Courts Act, 1896, which is in part as follows:—

7. Every officer or person against whom an action * * is brought * * in respect of any cause of action to which the provisions of the Act to protect Justices of the Peace and others from Vexatious Actions are applicable, shall have the same right to security for costs as a police magistrate has; and the proceedings shall be the same, as nearly as may be, as where security is applied for by a police magistrate or other justice of the peace under the Act to provide for Security for Costs in certain Actions against Justices of the Peace.

The action was brought against five defendants, and the statement of claim alleged that they falsely and maliciously conspired and procured one Hough to lay a charge of incest against the plaintiff, whereof he was acquitted, etc.

The defendant Northmore did not lay the information, but gave evidence before the magistrate upon the preliminary hearing as to certain facts which he had learned and certain acts done by him, in relation to the plaintiff, in his capacity of medical health officer of the village of Bath

and an associate coroner for the county of Lennox and Addington.

The appeal was argued before a Divisional Court composed of MEREDITH, C. J., and ROSE and MACMAHON, JJ., on the 11th January, 1897.

C. J. Holman, for the plaintiff. The defendant Northmore is a public officer, but he did not act as such in the transactions in question, nor is he sued as such. As health officer or coroner, he had nothing to do with this matter. He is charged as a conspirator. It was no part of his public duty to institute a prosecution for incest. See R. S. O. chapters 80, 205, 217; *Kelly v. Barton*, 26 O. R. 608; *McDonald v. Dickenson*, 25 O. R. 45.

R. McKay, for the defendant Northmore. All he did was to give evidence; he did not institute the prosecution. The form in which the plaintiff puts the action cannot relieve him from the consequences of the Act. See *McGuinness v. Dafoe*, 23 A. R. 704; *Sinden v. Brown*, 17 A. R. 173.

Holman, in reply.

Judgment was delivered on the 15th January, 1897.

MEREDITH, C. J.—The ground upon which the learned referee and the learned Judge proceeded was that the defendant Northmore was an officer or person coming within sec. 7 of the Law Courts Act, 1896. The only question, therefore, is whether the action is brought in respect of a cause of action to which the provisions of R. S. O. ch. 73 are applicable. The statement of claim alleges that this defendant with his co-defendants falsely and maliciously conspired and procured one Hough to lay a charge against the plaintiff. Affidavits are filed on the part of the defendant Northmore denying conspiracy, and shewing that he was a health officer and a coroner, and that the only acts he had done in any way relating to the plaintiff were inquiring into the circumstances attending the

death of a child, and determining that no inquest was necessary, and giving evidence before the magistrate as to what he had seen and done in relation thereto. The difficulty in the way of the defendant is that the cause of action alleged is not in respect of the matters which are detailed in the affidavits. If at the trial the plaintiff should seek to make out a case for any act done by this defendant as health officer, he must fail, for it is not covered by the statement of claim, nor has notice of action been given. It seems to me that we must look at the pleadings, and have regard only to them, for if we go outside of them, we shall, in effect, be trying the action on affidavits. The plaintiff has not been examined for discovery. I do not say what might be the effect if he had been so examined, and had disclosed his case more fully than his pleading reveals it. The order appealed from must be reversed.

ROSE, J.—On the argument, the case seemed to resolve itself into a question whether the pleadings or the affidavits should be looked at. Where, as here, the pleading is of such a character that the case could not go to the jury against the defendant as a public officer, he cannot claim the protection of the statute. The appeal must be allowed.

MACMAHON, J.—I agree.

*Appeal allowed with costs here and below
to the plaintiff in any event.*

COUSINS V. CRONK ET AL.

Amendment—Order of Court—Accidental Slip or Omission—Rules 536, 780—Carelessness—Delay—Terms.

One of several defendants in ejectment by a mortgagee disclaimed title and denied possession, and the plaintiff's action was dismissed at the trial. A Divisional Court reversed the decision at the trial, and ordered judgment to be entered for the plaintiff with all costs, the disclaiming defendant not appearing on the argument, although duly notified and served with the minutes of the order, upon which judgment was entered and execution issued :—

Held, upon a motion to amend or vary the order as to costs, made after some months' delay, that the Court, being satisfied that his defence was made out at the trial, in the exercise of its inherent powers over its records or the powers conferred by Rule 780, could now correct an error arising from an accidental slip or omission in its order, and make the order as to the applicant's costs which would have been made originally :—

Held, also, that he was entitled to relief under Rule 536, as amended by Rule 1454, as a party who, through mistake, had not been represented upon the argument of the appeal :—

Held, also, that the carelessness and delay of the applicant did not disentitle him to relief, though they afforded ground for imposing upon him the terms set out in the judgment.

[January 12, 1897.—*Divisional Court.*]

APPLICATION by the defendant Wilson Cronk to amend the order of a Divisional Court, dated 5th February, 1896, made on the motion of the plaintiff by way of appeal from the judgment pronounced by FALCONBRIDGE, J., at the trial, by striking out the direction which the order contained for payment by the defendants other than the infant defendant of the plaintiff's costs of the action and appeal, so far as they related to the applicant, on the ground that the words imposing the costs upon all the adult defendants were inserted in the order owing to an accidental slip; or to amend the order so as to relieve the applicant from payment of any costs thereunder; or for a re-hearing of the motion before the Divisional Court in respect to the question of costs directed to be paid by the defendants; or for an order directing that no execution or other process should be issued against the applicant, on the ground that the mind of the Court was not directed to the fact that the applicant was a party defendant to this action, and

that the Court did not wittingly direct that the applicant should pay the costs; or to rescind or vary the order of 5th February, under Rule 536, as amended by Rule 1454,* on the ground that the applicant was not represented upon the appeal through accident and mistake, and would have opposed any attempt to make him responsible for costs, had he been aware thereof.

The facts are stated in the judgment.

The application was argued before a Divisional Court composed of MEREDITH, C. J., and MACMAHON, J., on the 7th December, 1896.

Masten, for the applicant, cited Rule 780; *McMaster v. Radford*, 16 P. R. 20; *Hurdy v. Pickard*, 12 P. R. 428; *Re Swire*, 30 Ch. D. 239; *Hatton v. Harris*, [1892] A. C. 547; *Staniar v. Evans*, 34 Ch. D. 470; *Flett v. Way*, 14 P. R. 123.

W. R. Riddell, for the plaintiff, referred to *Port Elgin Public School Board v. Eby*, 17 P. R. 58; *Ainsworth v. Wilding*, [1896] 1 Ch. 673; *Preston Banking Co. v. Allsup*, [1895] 1 Ch. 144.

Judgment was delivered on the 12th January, 1897.

MEREDITH, C. J.—The action is for the recovery of land, and in the alternative, if the plaintiff should be held to be a mortgagee only, for foreclosure.

The applicant was defended by the same solicitors as his wife, who was also a defendant. She resisted the plaintiff's claim, and asserted title and the right to possession in herself; but the applicant, although by his statement of defence he states that he does not admit the allegations contained in the plaintiff's statement of claim, alleges that he is not and never was in possession of the lands in ques-

* Any party affected by an *ex parte* order, except the party issuing the same, or any party who has failed to appear on an application for an order through accident or mistake or insufficient notice of the application, may move to rescind or vary the same * * * .

tion, and that he does not and never did claim to be entitled to them, or any part of them, and he claims that the plaintiff's action as against him be dismissed with costs.

The husband and wife were represented at the trial by the same counsel. The husband was called as a witness, and deposed that he was not in possession of and made no claim to the lands, but it appeared in evidence that he had, shortly before the action was begun, assisted his wife in putting up a shanty on the lands, which she was doing in assertion of her title and right to possession.

At the trial the wife succeeded in her defence, and judgment was given dismissing the plaintiff's action with costs. On appeal by the plaintiff to the Divisional Court, the judgment pronounced at the trial was reversed, and judgment was given in favour of the plaintiff as to his right as mortgagee and for foreclosure, with the other directions consequent upon a judgment for foreclosure, and by the order, as drawn up, all of the defendants except the infant defendant were directed to pay the plaintiff's costs of the action up to and including the trial of it, and the costs of the appeal.

The applicant was not represented on the argument of the appeal because, as he alleges and states upon affidavit, he was advised by his solicitor that he was not concerned in or affected by the proceedings subsequent to the judgment at the trial.

That he should have been so advised is somewhat singular, in view of the fact that the appeal was against the judgment in his favour for costs, and the notice of appeal was directed to the solicitor for all of the adult defendants.

From my note of the argument, it is apparent that the position of the applicant as a disclaiming defendant was not brought to the notice of the Court, and that the argument and the judgment pronounced at the close of it proceeded upon the hypothesis that the position of all of the adult defendants was the same, and my recollection—aided

as it has been by the argument of the present motion—agrees with my note.

It is manifest, I think, that, had attention been called to the position of the applicant and the nature of his defence, the Court would not, at all events without a review of the evidence and a conclusion being reached that his defence was not made out, have ordered the applicant, as well as the other adult defendants, to pay the costs which by the order as drawn up they were directed to pay.

The applicant's case seems to me, therefore, to be brought within the principle of the cases cited by Mr. Masten, which enables the Court, either in the exercise of its inherent powers over its records or of the powers conferred by Con. Rule 780,* to correct any error arising from an accidental slip or omission in its judgments or orders, when it is brought to the attention of the Court.

There has no doubt been very considerable carelessness and delay on the part of the applicant. At the request of his solicitors, they were served with minutes of the order on the appeal, and notwithstanding that they provided for payment of the costs by all the adult defendants, including himself, he was not represented upon the settling of the order, and took no steps to correct the error until some months afterwards, when a seizure of his goods was made by the sheriff under an execution against him and the other adult defendants for the costs.

I do not think, however, under all the circumstances, that the carelessness and delay of the applicant, great as they have been, should disentitle him to relief, though they afford ground for granting the relief only on terms that work no injustice to the plaintiff.

The applicant has also, I think, made out a case of his not having been represented upon the argument of the appeal, through mistake, sufficient to entitle him to relief under Con. Rule 1454.

*780. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion without an appeal.

Having come to the conclusion that the applicant is entitled to relief, what, under all the circumstances, is the proper order to be now made?

I do not think that the evidence at the trial disproved the case made by the applicant, or justifies a finding against him upon the issues raised by his statement of defence. The only possession, if possession it was, which he appears ever to have had was while he was upon the land assisting his wife in building the shanty, and that possession was discontinued before this action was brought. I doubt very much whether there was any possession at all by the applicant of the land; although, if his entry upon it interfered with the possession of the plaintiff, he might be liable to an action of trespass at the suit of the plaintiff. The claim to the land was asserted not by the applicant, but by his wife, and the building of the shanty was not, as I understand the evidence, with any idea of the husband and the wife living upon the land, but in order to assert the title of the wife to, and to evidence her possession of, the land.

The circumstances are such, however, as afford, in my opinion, a sufficient reason for our not making the plaintiff pay the costs of the applicant's defence, especially as the husband and wife, as I have said, defended by the same solicitor.

The judgment of the Divisional Court and the order thereupon will be amended so as to make the costs payable to the plaintiff, payable by the adult defendants other than the defendant Wilson Cronk, and by inserting a provision that the Court does not see fit to make any order as to his costs.

The applicant must, as a condition to the granting of this relief, pay the costs of the application and the sheriff's fees, charges, and expenses, and must undertake to bring no action against the plaintiff or the sheriff for anything done under or by authority of the execution.

MACMAHON, J., concurred.

MCVEAIN V. RIDLER.

Arrest—Discharge—Order for—County Court—Appeal—Divisional Court
—Rule 1051—Intent to Quit Ontario—Intent to Defraud Creditors.

Upon an appeal by the plaintiff from an order of the Judge of a County Court, in an action in that Court, discharging the defendant from the custody of his bail, it was objected by the defendant that the order was not a final one, and that no appeal lay :—

Held, that the Court had, by Rule 1051, jurisdiction to discharge or vary the order, as explained in *Elliott v. McCuaig*, 13 P. R. 416.

Held, also, upon the evidence, that the defendant should not have been discharged from custody.

Tooth v. Frederick, 14 P. R. 287, not followed, having been in effect overruled by *Coffey v. Scane*, 22 A. R. 269.

Held, by the Court of Appeal, that no appeal lay, with or without leave, from the order of the Divisional Court.

[January 16, 1897.—*Divisional Court*.]

[January 22, 1897.—*The Court of Appeal*.]

THIS was an action in the County Court of the county of York to recover \$150.50 for goods sold and for the use and occupation of premises.

On the 10th October, 1896, an order was made by the junior Judge of the County Court for the arrest of the defendant, upon the ground that he was about to quit Ontario with intent to defraud his creditors generally or the plaintiff in particular (R. S. O. ch. 67, sec. 1).

The defendant was arrested under the order, and the sheriff having taken temporary bail in lieu of close custody, an application was made to the senior Judge of the County Court for the defendant's discharge.

Upon the evidence adduced before him, the senior Judge found that the defendant originally left Ontario to better his condition ; that he had to borrow money to get away ; that there was no evidence that he had any property or assets wherewith to meet his debts ; that he had therefore rebutted the presumption that his original leaving was with intent to defraud ; and that, having been arrested in Ontario upon a temporary visit to attend his mother's funeral, intending to return to his domicile in the United States of America, his proposed return was not with intent

to defraud. The learned Judge accordingly ordered that the defendant should be discharged from custody, and that temporary bail should be discharged and the security surrendered; and also that the defendant should be restrained from bringing any action against the sheriff or the plaintiff.

From this order the plaintiff appealed, and his appeal was heard by a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE, J., on the 9th November, 1896.

John MacGregor and *T. E. Williams*, for the defendant, objected that the appeal did not lie, because the order appealed against was not a final order, citing *Baby v. Ross*, 14 P. R. 440.

D. R. McLean, for the plaintiff.

THE COURT held that there was jurisdiction to entertain the appeal as a motion to discharge or vary the order, under Rule 1051, as explained in *Elliott v. McCuaig*, 13 P. R. 416.

The appeal was then argued upon the merits. The cases cited are referred to in the judgment, which was delivered on the 16th January, 1897, by

FALCONBRIDGE, J.—Appeal from an order of the senior Judge of the County Court of the county of York discharging the defendant from custody, and ordering that the temporary bail taken by the sheriff in lieu of close custody of the defendant be discharged and the security surrendered.

Tooth v. Frederick, 14 P. R. 287, is a judgment of a Divisional Court, and may not, under the Law Courts Act, 1895, sec. 9, sub-sec. (2), be disregarded or departed from by us when we are sitting as a Court of co-ordinate authority.

I have read and re-read the judgment of the Court of Appeal in *Coffey v. Scane*, 22 A. R. 269, and I have had

much difficulty in arriving at a conclusion as to whether the Court of Appeal, or a majority of the Judges thereof, expressly or impliedly overrule or disapprove of *Tooth v. Frederick*. The last named case is not referred to in the judgment, but it was, no doubt, cited in argument. Mr. Justice Osler re-states his view of the law as formerly expressed by him in *Robertson v. Coulton*, 9 P. R. 16, and I think that a careful perusal of the judgments of the Chief Justice and of Mr. Justice Maclellan indicates that they prefer that view to the one enunciated in *Tooth v. Frederick*.

With great respect, I am, therefore, of the opinion that *Tooth v. Frederick* is practically reversed by *Coffey v. Scane*.

The appeal will, therefore, be allowed with costs, and there will be an order restoring the order for the arrest of the defendant made by the learned junior Judge.

[On the 22nd January, 1897, an application was made by the defendant to the Court of Appeal for leave to appeal from the order of the Divisional Court. The Court dismissed the motion, holding that no appeal lay, with or without leave.]

CAMERON V. McLEAN ET AL.

MONES & CO. V. McCALLUM.

Receiver—Equitable Execution—Administration Action—Status of Receiver—Parties—Judgment Debtor—Addition of—Rule 324 (b).

A receiver appointed by way of equitable execution has no greater rights of action than the person for whom he is receiver, and if the judgment creditor can not proceed to administer an estate in order to make available the interest of his judgment debtor as a beneficiary therein, no more can the receiver; nor can the Court compel the judgment debtor to help his creditor to recover the fruits of an adverse judgment, either by adding him without his consent as a co-plaintiff in an action brought by the receiver for administration—against doing which Rule 324 (b) is conclusive—or by allowing the receiver to bring a new action in the name of the judgment debtor for the same purpose.

Stuart v. Grough, 14 O. R. at p. 257, and *McLean v. Allen*, 14 P. R. 291, not followed.

Allen v. Furness, 20 A. R. 34, *In re Potts*, 10 Mor. B. C. 52, and *Flegg v. Prentiss*, [1892] 2 Ch. 428, specially referred to.

McGuin v. Fretts, 13 O. R. 699, and *Bank of London v. Wallace*, 13 P. R. 176, distinguished.

[January 20, 1897.—*Boyd, C.*]

AN appeal by the plaintiff Cameron from an order of Mr. Cartwright, an official referee, sitting for the Master in Chambers, dismissing the appellant's application for leave to add McCallum, the defendant in the second action, as a party plaintiff in the first action; and a motion, in the alternative, by the plaintiffs Mones & Co. for authority to bring a new action in the name of McCallum.

The consent of McCallum was not filed.

By an order made in the second action (*ante* 102), Cameron, the receiver appointed at the instance of the plaintiffs therein, was given leave to bring an action for administration, no opinion being expressed as to his status; and he accordingly brought the first above named action in his own name; and this appeal and application were for the purpose of enabling him to properly constitute the action or institute a new one.

The appeal and motion were heard by BOYD, C., at the London Weekly Court, on the 19th January, 1897.

Idington, Q.C., for the plaintiffs.

E. R. Cameron, for the defendant McLean in the first action, and for the defendant in the second action.

Judgment was delivered on the following day.

BOYD, C.—In *Stuart v. Grough*, 14 O. R. at p. 257, it is said that a receiver by way of equitable execution has the right to get in the interest in the estate as to which he is appointed, and, if necessary, to apply for leave to bring an action for its recovery in the name of the beneficiary against whom the original judgment was obtained. For this no authority is cited, and I rather think that it indicates an unwarranted extension of the powers of receivers appointed by way of equitable execution, having regard to subsequent decisions which have thrown new light on the status and functions of such a receiver.

In *Stuart v. Grough* the order was simply to allow an amendment by adding the debtor as a co-plaintiff. That does not imply that he was to be added without his consent in writing, according to the course of practice defined by the Rules of Court.

McLean v. Allen, 14 P. R. 291, contains language which justifies the present application to bring in the judgment debtor *in invitum* as a party plaintiff, but, although reference is there made to Kerr on Receivers, Am. ed., p. 222, I find nothing there to support the expressions in the judgment. That case, besides, has to be regarded in the light of what is said in *Allen v. Furness*, 20 A. R. 34, at p. 40, where it is said the receiver ought not to be a party at all.

Altogether, the practice is in a very undefined and unsatisfactory condition, but I incline to think that the true solution is that the receiver in equitable execution has no rights beyond those of the person for whom he is receiver, and that the act, whatever it is, which is to complete or render effective this process to obtain payment, is to be taken by the judgment creditor: see *In re Potts*, 10 Mor. B. C. 52, 66; *Flegg v. Prentiss*, [1892] 2 Ch. 428, 430.

McGuin v. Fretts, 13 O. R. 699, is quite distinguishable from this case. There the receiver was seeking actively to recover debts due to an insolvent company, and it was held proper to add the name of the company in whom was the legal title to recover the debt from the defendant.

Here the receiver was appointed by way of equitable execution as to the interest of one McCallum in the estate of his father, whose executors are the present defendants, and the action is by the receiver substantially for administration of that father's estate, in order that the share of the debtor McCallum may be ascertained for the benefit of the original plaintiffs, Mones & Co. The application for receiver is reported in *Mones v. McCallum*, 17 P. R. 102, and my brother Street granted the order to bring an action for administration, after pointing out that the right of the judgment creditor to administer was by no means clear. If this present application were to add the name of the judgment creditors, Mones & Co., as co-plaintiffs with the receiver, then it would be analogous to the application in *McGuin v. Fretts*; but here it is asked that the judgment debtor, McCallum, whose interest in the estate is to be ascertained, should be added as a co-plaintiff without his consent, and indeed against his opposition. Essentially, therefore, it is a case of a plaintiff asking a defendant to help him to recover the fruits of an adverse judgment; a defendant would naturally object; and the Court has no power to coerce his reluctance or to enforce his appearance as a plaintiff. The receiver appointed by way of equitable execution, has no greater rights of action than persons for whom he is receiver, and if the judgment creditor could not proceed to administer an estate in order to make available the interest of a beneficiary therein, who is also a judgment debtor—no more can the officer of the Court styled the receiver.

Apart also from other objections, Rule 324 (b) is conclusive against allowing this appeal.

As to the motion to allow another action to be brought in the name of McCallum, I know of no power vested in

the Court to compel a defendant in an action to be a plaintiff in another in order that the judgment obtained against him in the former action may be realized by him in the second for the benefit of his quondam opponent. *Bank of London v. Wallace*, 13 P. R. 176, was a case where the statute provides for an action being brought in the name of an assignee without his assent or consent.

I have to dismiss the appeal and refuse the application with costs in cause to the defendant who appeared to oppose.

[An appeal by the plaintiffs Mones & Co. from the Chancellor's order dismissing their motion was heard by a Divisional Court on the 12th and 15th February, 1897. Judgment was reserved.]

WALTERS V. DUGGAN.

Security for Costs—Præcipe Order—Motion to Set Aside—Security for Costs of—Rule 1251.

A plaintiff may move to set aside a præcipe order requiring him to give security for costs, notwithstanding the stay of proceedings imposed thereby, without giving security for costs; and, where his writ of summons is specially indorsed, he is not compelled to follow the procedure indicated in Rule 1251, which is inapplicable unless he is moving for summary judgment under Rule 739.

Thibaudeau v. Herbert, 16 P. R. 420, distinguished.

[January 29, 1897.—*Meredith*, C. J.]

AN appeal by the plaintiff from an order of Mr. Cartwright, an official referee, sitting for the Master in Chambers, dismissing (upon a preliminary objection), an application by the plaintiff to set aside a *præcipe* order for security for costs.

The action was begun by a writ of summons, specially indorsed with a claim for a money demand, which shewed that the plaintiff's place of residence was out of the juris-

diction. The defendant thereupon issued and served the usual order requiring the plaintiff to give security for costs and staying proceedings.

The plaintiff's motion to set aside the order was based upon an affidavit shewing assets in the jurisdiction.

The defendant's objection to the motion was that the plaintiff could not move against the *præcipe* order, or take any other proceeding in the face of the stay of proceedings imposed, without at least complying with the order to the extent indicated by Rule 1251, which is as follows :—

“ Where an action is brought by a foreign plaintiff liable to give security for costs, who indorses his writ of summons with particulars of his claim in such a manner that, upon motion under Rule 739, an order allowing him to sign judgment might be made, he may, on being served with an order for security for costs, pay into Court the sum of \$50, as a partial compliance with such order, and thereupon he shall be set at liberty to proceed with a motion for judgment under Rule 739, but the order for security shall, nevertheless, in all other respects, have its full operation and effect.”

The learned referee gave effect to the objection and dismissed the motion.

The plaintiff's appeal from the order dismissing the motion was argued before MEREDITH, C. J., in Chambers, on the 29th January, 1897.

R. H. R. Munro, for the plaintiff.

W. R. Smyth, for the defendant, contended that where the plaintiff has specially indorsed his writ, and is therefore in a position to move for summary judgment under Rule 739, and where there is no admission by the defendant of the debt sued for, the plaintiff cannot move to set aside a *præcipe* order for security for costs, but must adopt the procedure pointed out in Rule 1251 : *Thibaudeau v. Herbert*, 16 P. R. 420 ; referring also to *Doer v. Rand*, 10 P. R. 165, and *Payne v. Newberry*, 13 P. R. 354.

Munro was not called upon to reply.

MEREDITH, C. J.—Before Rule 1251, a plaintiff could move against an order for security for costs without complying with the order by giving the security; and Rule 1251 makes no difference in this respect; it applies to a case where a motion for judgment is to be made under Rule 739 by a foreign plaintiff liable to give security for costs, and was not intended to restrict the right of one who alleged that he had been improperly ordered to give security for costs to move against the order requiring him to give security. Here the plaintiff is not moving for judgment under that Rule, and he may never do so. He attacks the order not upon the ground that he is entitled to immediate judgment, but upon the ground that he has assets in the jurisdiction.

The decision in *Thibaudeau v. Herbert*, 16 P. R. 420, has no application to the facts of this case; it was simply a decision that where the debt sued for is admitted by the defendant, he is not entitled to security for costs.

The appeal will be allowed, and costs will be in the cause. The motion to set aside the order will be referred back to the referee.

GRANT V. COOK.

Judgment Debtor—Examination—Right to Issue Appointment for.

A judgment creditor is *prima facie* entitled to issue an appointment for the examination of his judgment debtor; and, upon a motion to commit the latter for refusal to be sworn, it is for him to shew affirmatively that the issue of the appointment was an abuse of the process of the Court.

[January 18, 1897—*Divisional Court.*]

AN appeal by the defendant from an order of MEREDITH, C. J., in Chambers, requiring the defendant to attend at his own expense and submit to be sworn and examined as a judgment debtor, and pay the costs of the application made to commit him for his refusal to be sworn. The defendant attended upon an appointment obtained for his examination as a judgment debtor, but refused to be sworn, because, as he alleged, at the time the appointment was issued, there had been no return of *nulla bona*, nor had the sheriff stated that he was prepared to make such a return to the writ of *fi. fa.* issued upon the plaintiff's judgment.

The appeal was argued before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 18th January, 1897.

J. J. Warren, for the defendant, relied on *Ontario Bank v. Trowern*, 13 P. R. 422.

Tremear, for the plaintiff.

Judgment was given at the close of the argument.

THE COURT held that the plaintiff was *prima facie* entitled to issue an appointment for the examination of his judgment debtor, and that it was for the latter to shew affirmatively that the issue of such appointment was an abuse of the process of the Court. The uncontradicted affidavit of the plaintiff shewed that the facts existed which entitled the plaintiff to issue the appointment.

Appeal dismissed with costs.

FAULKNOR ET AL. V. CLIFFORD ET AL.

Jury—Findings—Failure to Answer Question—Effect of—Judgment—New Trial—Right to, without Motion for.

At the trial of an action for negligence causing the death of a servant of the defendants, the jury, in answer to questions, found that the defendants were guilty of negligence which caused the accident, and assessed the plaintiffs' damages, but disagreed as to and did not answer a question put to them as to whether the deceased, with knowledge of the danger, voluntarily incurred the risks of the employment :—

Held, that judgment could not, under these circumstances, be entered either for the plaintiffs or the defendants.

Decision of STREET, J., affirmed.

Held, also, that as soon as a decision was given, to which both parties yielded, that no judgment could be given for either of them on the findings, there was an end of the trial, and either party was at liberty to give a new notice of trial and again to enter the action for trial, as upon a disagreement of the jury, without moving to set aside the findings and for a new trial.

Decision of STREET, J., reversed.

McDermott v. Grout, 16 P. R. 215, approved.

Stevens v. Grout, *ib.* 210, overruled.

[January 12, 1897.—*The Court of Appeal.*]

THIS was an action by the widow and children of one Thomas Faulknor, who lost his life in consequence of an accident which occurred while working in the defendants' employment in the excavation of what was known as the Hunter street tunnel of the Toronto, Hamilton, and Buffalo Railway, in the city of Hamilton. While so working, a quantity of earth fell upon him from one side of the tunnel, pinning him to the ground and breaking a lamp, the oil in which taking fire caused the injuries which resulted in his death.

The case was tried before STREET, J., with a jury, to whom the following questions were submitted :—

(1) Did the deceased Thomas Faulknor, with knowledge of the danger to which he would be exposed by continuing in the employment in which he was engaged on the night in question, voluntarily incur the risks of the employment?

The jury disagreed, and did not answer this question.

(2) Were the defendants guilty of any negligence which caused the accident?

The jury answered "Yes."

(3) If so, in what did such negligence consist?

They answered, "In not sloping the banks."

And they assessed the damages in different sums for the widow and children of the deceased.

The plaintiffs moved for judgment on these findings against the defendants the Cliffords (the action having been dismissed as against the defendant Onderdonk), notwithstanding the failure of the jury to answer the first question, but the learned Judge after consideration refused to direct judgment.

The defendants not having moved for judgment on any ground which might have been open to them, and the plaintiffs not desiring to appeal from the judgment of STREET, J., notice of trial was given for the next following Assizes at Hamilton, and the action was duly entered for trial there, without objection on the defendants' part. STREET, J., who was again the trial Judge, refused, however, to try it, following the judgment of a Divisional Court in the case of *Stevens v. Grout*, 16 P. R. 210, on the ground that the findings at the former trial should have been set aside and a new trial ordered.

The plaintiffs then moved before a Divisional Court by way of appeal from the judgment of STREET, J., refusing to enter judgment in their favour on the findings, and, in the alternative, by way of appeal from his refusal to try the action when it came before him on the second occasion.

When the motion came on for argument, the Divisional Court were met as regards the second alternative with the two opposite decisions pronounced on the same day of *Stevens v. Grout* by a Divisional Court of the Queen's Bench Division, which STREET, J., had followed, and *McDermott v. Grout*, 16 P. R. 215, by a Divisional Court of the Common Pleas Division, in which the contrary practice, which had been adopted by the plaintiffs in this case, had been declared to be right.

The Divisional Court thereupon, treating the case as one for the application of sec. 79, sub-sec. (2), of the Judicature Act of 1895, ordered "that the appeal be referred for hearing to the Court of Appeal."

When the case came on for hearing before this Court (BURTON, OSLER, and MACLENNAN, JJ.A.), under this order, on the 25th November, 1896, the Court felt some doubt as to whether it was one properly arising under sec. 79 (2). STREET, J., having merely refused to try the case, and there having been no motion against the notice of trial, the Court considered that it would rather appear as if there was nothing which was properly the subject of appeal beyond the original refusal to enter judgment in the action. In order to save further expense and delay, the Court suggested and the parties consented that the case should be treated (waiving the usual preliminary procedure) as an appeal on all grounds open to either of them, directly to this Court, and it was accordingly argued on that footing.

McBrayne, for the plaintiffs, contended (1) that STREET, J., ought to have directed judgment in their favour in the action on the answers of the jury to the second, third, and fourth questions, and that the first question was not material to the issues in the action, the deceased not being "*volens*" within the meaning of such cases as *Smith v. Baker*, [1891] A. C. 325; and *Hurdman v. Canada Atlantic R. W. Co.*, 22 A. R. 292; 25 S. C. R. 205; (2) that if the plaintiffs were not entitled to judgment, the action was regularly before STREET, J., for trial, and ought to have been tried by him when it was entered for trial at the subsequent Assizes.

Lynch-Staunton, for the defendants, contended that the evidence clearly shewed that the deceased had voluntarily incurred the danger of the accident with knowledge of all the circumstances; that it was one of the risks of his employment which he deliberately accepted, and conse-

quently could not hold his employers liable for the injury which happened.

Judgment was delivered on the 12th January, 1897.

OSLER, J. A.—(after setting out the facts as above).—It appears to me very clear that my brother Street was right in refusing to direct judgment for the plaintiffs. Indeed it is only by force of what has subsequently happened that their counsel has been driven to contend otherwise. A finding in favour of the defendants in answer to the first question would have been a complete answer to the action, notwithstanding the other findings in favour of the plaintiffs. There was evidence in support of such a finding, but the jury have disagreed and have not answered the question. The trial was therefore incomplete, and no judgment could be given. This disposes of the formal appeal from the judgment at the trial.

Then as to what may be called the defendants' cross-appeal which is in fact an application to enter judgment in their favour on the evidence relating to the first question, though the question remains unanswered. I am equally clear that it cannot succeed. The question of "*volens*" or not "*volens*" is a question of fact, and upon the evidence I think it is quite open to the jury to answer it in the plaintiffs' favour, having regard to what is said by Lord Herschell in his speech in the House of Lords in *Smith v. Baker*, [1891] A. C. 325, if they should again find that the deceased was subjected to risk owing to a breach of duty on the part of his employers, either in not sloping the bank, by which I understand that the jury meant sloping it away from the trench cut for the water-pipe parallel to the wall of the tunnel, or in not having some one to watch the bank and warn the workmen at the very first appearance of the danger becoming imminent.

The appeal and cross-appeal therefore both fail.

Then as to the point of practice. We ought to dispose of this, whether it has been properly referred to us by the Court

below or not, because it may again arise in this very case after our judgment, just as it did after the judgment of our brother Street. We dispose of the case as it has been presented to us. We affirm the judgment of Street, J., and make no order respecting the findings of the jury or for a new trial. In what position, then, does the case stand? Or rather, in what position did it stand after the judgment at the trial refusing to direct judgment, because neither party was obliged to appeal nor did appeal except as that course was forced upon them in order to avoid a difficulty in further proceeding with the action?

I have read and considered with care the two judgments in the *Grout* cases in 16 P. R., and with every respect for those of my learned brethren who decided *Stevens v. Grout*, I concur with the decision in *McDermott v. Grout*, in which the opposite view was taken.

As soon as a judgment was given which both parties yielded to, that no judgment could be given for either of them on the findings, there was an end, in my opinion, of the trial, and either party was at liberty to give a new notice of trial and again to enter the action for trial. True it is that either party might have appealed from the refusal to direct judgment, and on such appeal the Court appealed to might have acted under Rule 755 or might have ordered that all or some only of the findings should be set aside and a new trial had as to the latter only. Effect in that case would have been given to the other findings, and sometimes such a course is convenient and saves expense. I think, however, that the parties may well be trusted to take care of their own interests in that respect, and if they yield to a judgment which declares the findings to have had no effect in disposing of the action, there is neither reason nor authority for putting them to the expense of moving against the findings and for a new trial. Such a judgment not appealed from, or affirmed merely, is, to my mind, as complete a disposition of all that had taken place at the trial as if the jury had disagreed.

It has been said that there is some analogy in principle

between such a case as this, where the jury have failed to answer all the questions necessary to enable the Judge to dispose of the action, and the case of a special verdict where the findings are not sufficient to enable the Court to determine in whose favour the cause should be decided. With all deference, I do not think so, because, if for no other reason, the verdict is a piece of technical procedure which, if wrong, must be got rid of, and which, perhaps, the trial Judge has not power to set aside. Neither principle nor authority requires us to attach the same effect to mere findings of the jury which have been adjudged to be insufficient to dispose of the action. This would be to introduce a needless technicality, where none exists, with the usual consequence of increased cost and delay.

No one has been able to suggest a reason why, after such a judgment, these findings, adjudged thereby to be ineffectual, should be formally set aside and a new trial ordered. There is nothing in the case of *Marsh v. Isaacs*, 45 L. J. N. S. C. L. 505 (1876), cited in *Stevens v. Grout*, to shew that such a course is necessary or proper. So far as it bears at all on the present case, it is the other way. Issues were raised in respect of four separate causes of action, as to three of which the jury found a verdict for one party or the other. As to the fourth, they disagreed and were discharged. It does not appear whether the trial Judge was asked to direct judgment, but on the defendant moving against the verdict, contending that there must be a new trial generally, the Divisional Court simply did what I suppose no one doubts the trial Judge would do now, namely, directed judgment for the respective parties in accordance with the verdict, and (without ordering a new trial) left them to do as they pleased with that part of the action on which the jury had been unable to agree.

In *Wills v. Carman*, 14 A. R. 656, also cited in *Stevens v. Grout*, the jury had returned an irregular or void verdict, not by way of findings in answer to questions put to them by the Judge, and the Judge had directed judgment to be entered for the defendant dismissing the action. The

plaintiff was necessarily obliged to appeal against both, and a new trial was ordered in the usual way.

The cases of *Conradi v. Conradi*, L. R. 1 P. & D. 514, and *Butler v. Butler*, [1894] P. 25, may be referred to. In both, the finding or verdict of the jury was followed by a judgment, and, although in the latter, on the intervention of the Queen's Proctor, it was held that the parties had been guilty of conduct which disentitled them from reaping the benefit of the judgment, yet, as between them, it remained a judgment upon the facts found by the jury.

In my opinion, the action was regularly entered for trial after the judgment at the first trial, the findings of the jury having been fully disposed of by what then took place, and it should have been tried in the ordinary course.

Under the circumstances, there should be no costs to either party of these proceedings.

RE CENTRAL BANK OF CANADA.

Appeal—Leave—Winding-up Act—Successive Applications—Special Circumstances—Terms.

Orders having been made in the matter of the winding-up of an insolvent bank for payment of certain moneys out of Court to the executors of the purchaser from the liquidator of the assets, and the moneys having been paid out to them, the Receiver-General for Canada asserted a claim to such moneys under secs. 40 and 41 of the Winding-up Act, R. S. C. ch. 129, and, not having been a party to the applications for payment out made by the executors, presented a petition for payment over to him by them or repayment into Court of such moneys; or, in the alternative, for leave to appeal from such orders. This petition was dismissed, upon the ground that the petitioner was not entitled to complain, even if the moneys had been improperly paid out.

Upon an application by the petitioner for leave to appeal to the Court of Appeal from the order dismissing his petition :—

Held, that a Judge of the High Court had power to grant the leave sought, the application not being in effect a second application for leave to appeal from the orders for payment out.

And, under all the circumstances of the case, leave to appeal was granted, upon security for costs being furnished, the question being a new and important one and the amount involved considerable.

[January 22, 1897.—*Meredith, J.*]

THIS was an application by the Receiver-General for the Dominion of Canada for leave to appeal to the Court of Appeal from an order of STREET, J., in Court, made in the matter of the winding-up of the bank. The order sought to be appealed against dismissed the petition of the applicant for an order directing that the executors of the will of G. R. Hogaboom, deceased, should pay over to the applicant, or into Court, certain moneys, amounting to \$3,600, paid out of Court to them under orders made by ARMOUR, C. J., in Court, in this matter, on the 4th January, 1895, and the 16th May, 1896, or for leave to appeal from these two orders. The moneys were claimed by the applicant under secs. 40 and 41 of the Winding-up Act, R. S. C. ch. 129. STREET, J., held that, even if the orders of ARMOUR, C. J., were improvidently made, the applicant was not entitled to complain, because it was not such moneys as those in question that were intended to be dealt with by these sections.

The application for leave to appeal was heard before MEREDITH, J., in Court, on the 19th January, 1897.

Moss, Q. C., and *F. E. Hodgins*, for the applicant.

S. H. Blake, Q. C., and *W. R. Smyth*, for Hogaboom's executors.

Judgment was delivered on the 22nd January, 1897.

MEREDITH, J.—My power to make the order sought is questioned ; it is said that the application to Street, J., was in effect an application for leave to appeal from the orders of Armour, C. J., under which the moneys in question were paid out of Court, and that this application is substantially an appeal from the refusal of another Judge to grant leave to appeal from those orders.

If that were in fact so, I would refuse this application, whether or not I have power to grant it ; for it would needs be a very exceptional case where, upon the same material, another Judge would grant an application which one Judge, having the like power, had refused.

And it has been decided that after the refusal by one Judge to give leave to appeal in proceedings under the Winding-up Act, another Judge has no power to give such leave : *Re Sarnia Oil Co.*, 15 P. R. 347.

But I cannot think that the real question before Street, J., was whether leave to appeal against the orders of Armour, C. J., ought or ought not to be granted, though in one of the notices of the motion given it was one of the alternatives which it was said would be asked for.

The present applicant was no party to the motions under which the orders were made, either directly or indirectly ; nor had he any notice of them ; and the orders provide merely for payment out of Court to the present respondents of certain sums of money. Their force and effect was spent as soon as the money was paid out accordingly. What gain in a successful appeal against those orders ? It would not put the money into Court again. The most that could be effected by it would be a rescission

of the orders. A substantive motion for repayment of the moneys would be necessary. I cannot doubt that where money has been so paid out to a person not entitled to it, another order may be made for repayment of it by that person, without getting rid of the first order; though it would be quite proper to discharge the order for payment out, as well as make the order for repayment, as was done in *Slater v. Slater*, 58 L. T. N. S. 149. I cannot doubt that such an order can be made by the Court, *ex mero motu*, and ought to be so made, if no application is made by a person interested, when the fact is discovered.

But, if it were needful to get rid of the orders for payment out, the proper course would not, in my judgment, be, in such a case as this, by way of appeal, but would be by way of a substantive motion to discharge or rescind them; for what right would any one, neither directly nor indirectly represented upon the motion, have to appeal; and why should he be obliged to appeal when his motion would be based upon facts not disclosed in the material before the Court? The motion is necessarily a substantive one. As said by Cotton, L. J., in *Boyle v. Sacker*, 39 Ch. D. 249, at p. 251, "discharging an order is not the same thing as reversing or varying an order, it does not go on the ground that there has been an erroneous decision, but on the ground that the opposing party has not had an opportunity of being heard:" see *Black v. Dawson*, [1895] 1 Q. B. 848, where the Court of Appeal, after consideration and consultation, laid down the rule that there must be an application to rescind before appealing.

However, if I am wrong, and the contention for the respondents is right, by giving leave to appeal will not wrongly decide the question finally; the appeal, if taken, will fail because it is really an appeal against the orders of the learned Chief Justice without leave; while, if I refuse the leave upon such contention and I am wrong, an irreparable injury will be done if the applicant has a right in the matter, and if *Re Sarnia Oil Co.* was rightly decided.

Then, the case being one in which I have power to give

leave to appeal, ought that power to be exercised in favour of the applicant? The learned Judge whose judgment is sought to be questioned thinks that, under all the circumstances of the case, the leave may rightly be given; and I agree with him in that; for, if the facts are as the applicant contends for, and as they *primâ facie* seem to be, the respondents have received out of Court over \$3,000 to which they have no colour of right, and which unquestionably, by some means or other, they ought speedily to be compelled to repay with interest. The learned Judge did not refuse the applicant's motion because he thought that was not the fact, but solely because he thought the applicant had no right to complain. If that be so, if the applicant has no interest whatever in the money, doubtless the application before him might properly be dismissed; and this matter ought not to go further; but other proceedings should be speedily taken to make good the wrong done, if the money were wrongly paid out.

The case is not like one of stirring up strife and litigation over a very uncertain claim which had been long allowed to sleep. If the facts alleged by the applicant are true, then it seems to me that an imperative duty rests upon the Court to right the wrong done by it, at the instance and upon the application of the respondents; and perhaps that the respondents might well be the last persons who ought to resist a judicial inquiry into the facts; for, if they were rightly entitled to the money, they can as well shew their right now as they could have shewn it when the money was obtained; time cannot have dimmed the evidence of it.

It seems to me quite immaterial whether or not creditors may want the money; if they desire to make a present of it to the respondents, it is for them, not the Court, to do that; while, if the money was rightly theirs under their purchase of assets of the company, an inquiry will disclose that, and remove even suspicion from them, at the expense of the applicant.

Then the question decided by Street, J.—the only ques-

tion dealt with by him—is a new one, arising, it seems, now for the first time, and is one of some considerable importance, and the sum involved is no mean one—facts which make against concluding the parties finally by the judgment of a single Judge.

Upon the applicant securing the respondents in their costs of the appeal by payment into Court of \$400, or by giving other security to that amount, to the satisfaction of the registrar of this Court, if the parties differ as to it, leave will be given under sec. 74 of the Act to the applicant to appeal against the decision or order in question; costs of this application will be costs in that appeal.

SMYTH V. STEPHENSON.

Security for Costs—Libel—Newspaper—R. S. O. ch. 57, sec. 9—Criminal Charge—Pleading—Innuendo.

Where a statement of claim in an action for libel contained in a public newspaper is not so defective as to be demurrable, and the words are alleged by the plaintiff to have been used in a sense which involves the making by the person using them of a criminal charge against the plaintiff, and may have that meaning, the case is brought within the exception contained in clause (a) of sec. 9 (1) of the Act respecting Actions of Libel and Slander, R. S. O. ch. 57, and the defendant is not entitled to security for costs. That clause is applicable to cases where an innuendo is necessary to give the words complained of a defamatory sense; and upon an application for security there cannot be a trial of the action on the merits in order to determine whether the words used involve a criminal charge.

[February 11, 1897.—*Meredith*, C. J.]

AN appeal by the plaintiff from an order made by one of the local Judges at Chatham requiring the appellant to give security for the costs of the action, so far as it was brought for libel. The facts are stated in the judgment.

The appeal was argued on the 4th December, 1896.

H. J. Scott, Q. C., for the plaintiff.

E. D. Armour, Q. C., for the defendant.

Judgment was delivered on the 11th February, 1897.

MEREDITH, C. J.—The only question raised upon this appeal is as to whether the alleged libel of which the plaintiff complains “involves a criminal charge,” within the meaning of R. S. O. ch. 57, sec. 9, sub-sec. 1 (*a*).

The statement of claim sets out that the defendant on the 4th March, 1896, at the request of the plaintiff, printed and published in his newspaper a statutory declaration made by one James McMahon giving the particulars of a certain conversation between one William Delahanty and T. W. Torrance in which the conduct of the plaintiff as chairman of the Board of Works of the council of the city of Chatham was discussed; and that, in commenting upon this declaration, the defendant falsely and maliciously printed and published the following words: “There was not a man in sight while I (meaning the said T. W. Torrance) talked with Delahanty, or rather while Delahanty talked with me, for the inspector was brimming over with information, and gave it without stint. Mr. McMahon’s presence is a creature of Harry Smyth’s fertile brain.” And the meaning to be attached to these latter words, the plaintiff alleges to be, that the plaintiff had procured McMahon to sign the declaration, untruly stating and alleging that he was present at the time of the conversation between Torrance and Delahanty.

The defendant contends that the alleged libel, as charged in the statement of claim, does not involve a criminal or indeed any charge against the plaintiff; that there is nothing in the pleading to shew that the plaintiff had anything to do with procuring the statutory declaration of McMahon, or that in the alleged libel it was charged that he had; and to this contention the local Judge has given effect.

The pleading is not very accurately drawn, but sufficient appears, I think, to bring the case within the exception contained in clause (*a*) of sub-sec. 1 of sec. 9. Taking all of the statements together, there is enough, I think, to entitle the plaintiff to have the question submitted to the jury

as to whether the words alleged to have been published by the defendant were used in the defamatory sense imputed to them by the plaintiff.

If the defendant's contention be the right one, the statement of claim discloses no cause of action, and might, under the former practice, have been demurred to. I cannot say that it so defective as to have been open under that practice to demurrer ; and if the words which a plaintiff charges to have been used in a sense which involves the making by the person using them of a criminal charge against him, may have that meaning, the case is, in my opinion, brought within the exception.

I do not see how the provisions of the Act can be worked out, unless it be applicable, as well to such cases as I have referred to, as to words plainly defamatory, and as to which no innuendo is necessary to give them their defamatory sense. If it were otherwise, as it seems to me, where the words were not defamatory *per se*, on an application for security for costs, the action would have practically to be tried on the merits in order to determine whether the words used did involve a criminal charge.

I do not mean to say that if on the pleading of the plaintiff it were clear that the words alleged to have been used could not have a meaning which involved the making of a criminal charge against the plaintiff, he could escape giving security by attributing such a meaning to them.

The appeal must, in my opinion, be allowed, and the order for security for costs reversed, and the costs here and below will be costs in the cause to the plaintiff in any event.

In *Drumm v. O'Beirne*, MEREDITH, C.J., on the 22nd February, 1897, allowed an appeal from an order of a local Judge requiring security for costs to be given by the plaintiff in an action of libel against the proprietor of a newspaper. The circumstances were similar to those in the case above, with this difference, that the plaintiff was not mentioned by name in the newspaper article complained of. As to that, the learned Chief Justice was of opinion that, upon the statement of claim, it was impossible to say that the question whether the plaintiff was pointed at by the article could be withdrawn from the jury.

HOGABOOM ET AL. V. MACCULLOCH ET AL.

Amendment—Statement of Claim—Writ of Summons—Service out of Jurisdiction—Adding New Claim—Limitation of Actions—Terms.

Where a writ of summons in an action for a specified cause has been issued and served upon defendants out of the jurisdiction, with a statement of claim, pursuant to an order under Rule 271 (1309), and the defendants have appeared, an order may properly be made allowing the plaintiffs to amend the statement of claim by adding a new claim for an entirely different cause of action, provided that it is a claim in respect of which leave to serve process out of the jurisdiction might have been obtained.

Holland v. Leslie, [1894] 2 Q. B. 346, 450, followed.

Held, also, that the plaintiffs should, in respect of the Statute of Limitations running against their added claim, be placed in the same position as if their action for the added claim had been brought at the date of the amendment.

[March 3, 1897.—*Ferguson*, J.]

AN appeal by the defendants from an order of Mr. Cartwright, an official referee, sitting for the Master in Chambers, allowing the plaintiffs to amend their statement of claim by adding a claim for damages in respect of the alleged conversion of goods of the plaintiffs. The defendants were resident out of the jurisdiction. The writ of summons was indorsed only with a claim for the recovery of money lent, the plaintiffs having been, by an order in Chambers, permitted to issue a writ so indorsed for service out of the jurisdiction upon the defendants. The writ was served and a statement of claim with it. The defendants appeared, and the plaintiffs after appearance, upon notice to the defendants, obtained the order to amend as above stated, from which the defendants appealed.

The appeal was argued before FERGUSON, J., in Chambers, on the 1st March, 1897.

N. F. Davidson, for the defendants.

W. N. Ferguson, for the plaintiffs.

Judgment was delivered on 3rd March, 1897.

FERGUSON, J.—The plaintiffs brought an action against the defendants, who are resident out of the jurisdiction, the cause of action being money lent, as alleged by the

plaintiffs. In order to effect service of process on the defendants, the plaintiffs took the prescribed preliminary steps and obtained the necessary leave under the provisions of Rule 1309: see sub-sec. 3 of this Rule.

Afterwards, and after the defendants had appeared in the action, the plaintiffs discovered, or thought they discovered, that they had another and different cause of action against the defendants as well, viz., an action for the conversion of goods. An order was made in Chambers allowing the plaintiffs to amend their statement of claim by adding this additional claim for the alleged tort, the conversion. From that order is this appeal.

The case *Holland v. Leslie*, [1894] 2 Q. B. 346 and 450, seems to me to determine the matter in favour of allowing the amendment, the subject of the amendment being a matter or claim in respect of which leave to serve process out of the jurisdiction might have been obtained. The subject of the amendment here is a tort, and if committed within the jurisdiction such leave could have been obtained. It was said in argument that the pleading by way of amendment does not shew that the tort did take place in Ontario. This, I think, should be stated, and I think this trifling amendment—that is, trifling as to extent—should still be made, and I think I may here grant leave to make it.

It was not shewn that the Statute of Limitations had run against the plaintiffs in respect to this tort so as to be a reason for not allowing the amendment. Yet, so far as it is possible so to do, the plaintiffs should, in respect of the statute running against their action for the alleged tort, be placed in the same position as if their action for the tort had been brought at the date of the amendment.

I think the appeal should be dismissed; the costs to be costs in the cause to the plaintiffs in any event.

RE CURRY, CURRY V. CURRY.

Account—Master's Office—Verification—Affidavit—Vouchers—Cross-Examination—Notice—Re-opening Account.

The person bringing into the Master's office an account, verified by affidavit, is obliged to vouch the payment of the amounts included in it, and is liable to cross-examination upon his affidavit, notice being first given him of the items upon which it is proposed that he shall be cross-examined.

Where no such notice was given, and the executor was not cross-examined, although ample opportunity was offered for the purpose, and the accounts were in no way objected to until the reference had been closed so far as the evidence was concerned, the Master properly considered that the affidavit verifying the accounts under Rule 63 and the vouchers had sufficiently proved the accounts.

Wormsley v. Sturt, 22 Beav. 398; *Re Lord*, L. R. 2 Eq. 605; *McArthur v. Dudgeon*, L. R. 15 Eq. 102; *Meacham v. Cooper*, L. R. 16 Eq. 102; *Bates v. Eley*, 1 Ch. D. 473, followed.

Upon an application to re-open an account of \$55,129.54, comprised in upwards of 1,600 items of disbursements, one or two items were pointed out as appearing *prima facie* to be of such a character as might have been objected to:—

Held, not sufficient to justify opening up the whole account, especially in view of other facts appearing.

[January 23, 1897.—*Street, J.*]

AN appeal by the defendants Annie H. Curry and Cora J. Curry from a report of the local Master at Windsor in an administration matter. The judgment below relates to one branch of the appeal, and the facts are stated in it.

The appeal was argued upon that branch on the 11th January, 1897.

McCarthy, Q. C., and *O. E. Fleming*, for the appellants.

S. H. Blake, Q. C., and *R. F. Sutherland*, for the respondents.

Judgment was delivered on the 23rd January, 1897.

STREET, J.—In the 8th paragraph of their notice of appeal the defendants appeal against the allowance of the sum of \$55,129.54, comprised in upwards of 1,600 items of disbursement set out in the executor's International Hotel account, and particularly as to some 400 specified items of the 1,600, covering nearly \$15,000.

It appears from the statements of counsel and from their admissions and from the Master's certificate dated 21st January, 1897, settled in presence of both parties, that what took place with regard to the account in question was this. The executor brought in the account verified by affidavit, and left it in the Master's office. The defendants' solicitor, after checking over the items of disbursement with the vouchers, gave a written admission of the payment of all the sums but certain specified ones, which were afterwards vouched, but refused to admit any thing beyond the fact of payment. The plaintiff the executor was cross-examined at very great length upon his affidavit verifying his accounts, but I think I am correct in saying that he was not cross-examined at all upon the matters which are sought to be raised upon this ground of appeal, and that the defendants gave no notice to him that they intended to dispute his right to charge the various sums included in the account. After the evidence on both sides had been closed, the defendants' solicitor, upon the settling of the report, for the first and only time raised the question by objecting that no proof had been given that the sums in question were properly chargeable against his clients. The Master overruled the objection and allowed the amounts charged.

In my opinion, the Master's ruling was right, and he was right in treating the items as proved. The practice laid down in *Wormsley v. Sturt*, 22 Beav. 398, has been approved in an undisputed line of cases since: see *Re Lord*, L. R. 2 Eq. 605; *McArthur v. Dudgeon*, L. R. 15 Eq. 102; *Meacham v. Cooper*, L. R. 16 Eq. 102; *Bates v. Eley*, 1 Ch. D. 473.

The person bringing in an account verified by affidavit is obliged to vouch the payment of the amounts included in it, and is liable to cross-examination upon his affidavit verifying the accounts, notice being first given him of the items upon which it is proposed that he shall be cross-examined.

In the present case no such notice was given, the execu-

tor was not cross-examined, although ample opportunity was offered for the purpose, and the accounts were in no way objected to until the reference had been closed so far as the evidence was concerned. Under these circumstances, I think that the Master properly considered that the affidavit verifying the accounts under Rule 63 and the vouchers had sufficiently proved the accounts, and that the appeal from his ruling must be dismissed.

I was asked upon the argument to reopen the account in case I should come to the conclusion that the appeal should be dismissed ; but no good reason for reopening it was stated ; one or two items were pointed out as items which appeared *primâ facie* to be of such a character as might perhaps have been objected to ; but that would not, in my opinion, justify me in opening up the whole of this enormous account, especially bearing in mind that all the payments in question made during the lifetime of Alexander Cameron must be assumed to have been made with his concurrence, as he furnished one-half of all the money expended.

REGINA EX REL. MASSON V. BUTLER.

Municipal Elections—Quo Warranto—Withdrawal of Relator—Intervention—Substitution.

Where the relator in a proceeding in the nature of a *quo warranto* under the Consolidated Municipal Act, 1892, desires to withdraw, the Court has no power, under the statute or otherwise, to compel him to go on against his will, nor to substitute a new relator.

The power given by sec. 196 is to substitute a new defendant, not a relator

[March 4, 1897.—*Boyd, C.*]

A MOTION was made before the junior Judge of the County Court of Carleton, pursuant to his *fiat* previously obtained, on behalf of Andrew Masson, relator, for an order, under the Consolidated Municipal Act, 1892, sec. 197, setting aside and declaring invalid and void the election held on the 4th January, 1897, at the city of Ottawa, under and by virtue of which election Thomas Butler, the defendant, unjustly usurped the office of alderman for the municipality of the city of Ottawa, and declaring that Albert Hudson, a candidate at such election, was duly elected thereto, and should now be admitted to such office.

At the hearing of the motion Masson asked leave to withdraw as relator, and the Judge thereupon offered to allow a relator to be substituted, but the solicitor for the original relator not being ready at once to suggest a new relator, and no one offering to come forward, the Judge dismissed the motion.

Albert Hudson, the candidate on whose behalf the office had been claimed by Masson, came forward as an "intervener," and appealed from the order of the junior Judge dismissing the motion.

The appeal was heard by BOYD, C., at the Ottawa Weekly Court, on the 2nd March, 1897.

R. J. Wicksteed, for the appellant. The discretionary power of the Court in *quo warranto* proceedings, after notice

is issued, is not to be exercised so as to refuse to enforce the law and allow the relator to withdraw. The state has the right to know by what warrant the officer acts in a public capacity. There should be a new trial in the nature of a *quo warranto*. By sec. 196 of the Municipal Act, a person may be allowed to intervene to defend, but not to prosecute. The following authorities may be referred to: Eng. & Am. Encyc. of Law, vol. xix., p. 667; *State v. Brown*, 5 R. I. 1; Kerr's Blackstone, vol. iii., 4th ed. (1876), p. 263; Holland's Elements of Jurisprudence, 4th ed., p. 270; Markby's Elements of Law, 4th ed., sec. 822.

No one appeared for Masson.

O'Gara, Q. C., for the defendant. The whole machinery for such cases is provided by the Municipal Act, secs. 187-196. The power should be exercised by the Judge before whom the motion is returnable. "Defend" in sec. 196 means to defend the position against the attack of the relator. There is no power now to review the Judge's ruling, for the option he offered was refused. The relator, as *dominus litis*, has the right to withdraw. To allow intervention now, would be a re-opening of the matter; it would be in effect a new petition against Butler. There should not be a second attack, more especially after the time allowed by the Act for the attack has expired: *The Peel Case*, H. E. C. 485. The right of intervention is not as of course, but depends upon circumstances and the discretion of the Court. But he did not bring about the withdrawal of Masson, as I shew by affidavit. This is a fresh motion, and not in substance a motion by way of appeal at all. There is no power to amend after the time has expired: *Maude v. Lowley*, L. R. 9 C. P. 165; *Purcell v. Kennedy*, 14 S. C. R. 453. The motion should be dismissed with costs.

Wicksteed, in reply. The appeal is on a point of law. The whole point involved in the appeal is whether a relator can withdraw at his caprice and leave the case without a plaintiff. He is put there with the consent of the Judge. No delay was allowed to bring in a relator, and, as I had none ready, I declined because I had no time.

Judgment was delivered on the 4th March, 1897.

BOYD, C.—Dr. Wicksteed moves in appeal from Judge Mosgrove, who allowed the relator to withdraw from the prosecution of this motion by way of *quo warranto*, on very broad grounds set forth as follows: "The discretionary powers of the Court over the motion in the nature of a *quo warranto* to inquire into the title to a public office relate in allowing the notice of motion to be issued in the name of the Queen by a private relator; but when such notice of motion is allowed to be issued and served, the Court has no power to dispense with the law applicable to the case upon its trial, or to refuse to enforce the law on the ground that the said private relator has from private interest, monetary consideration, influence or terror exerted over him by the friends of the defendant, or the defendant himself, asked leave to withdraw from the case, and has refused further to complain or prosecute. The state has a right to know by what warrant one of its citizens presumes to exercise the office of alderman. And when the Court is asked, in this the appropriate mode, to assist the state in its inquiry, the former can find no ground for declining to render aid. In taking cognizance of wrongs and unlawful acts, the law has a double view, viz., not only to redress the party injured, but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws which the sovereign power has thought proper to establish for the government and tranquillity of the whole."

The provisions of the Municipal Act for the trial of controverted elections are statutory modifications of the old method of trial in cases of usurped franchise by the writ of *quo warranto*. The old writ was of a purely civil character, issuing in judgment of ouster, by which the franchise was freed from usurpation; and of like character is the remedy in the case of municipal officers. So that all the arguments addressed to me as to the functions of the state in the application of criminal law are without pertinence.

The section in the statute most discussed and bearing on the present case, sec. 196, Consolidated Municipal Act of 1892,* finds its appropriate explanation in the method of procedure which obtained in *quo warranto* informations. Provision is made for the intervention of persons qualified to be relators who may come in for the purpose of defence. This is based on the old law whereby, when the Court was convinced that important questions arose or were likely to arise which the defendant was unwilling to contest, another person interested was permitted to conduct the defence at his own risk as to costs: *Rex v. Dawes*, 4 Burr. 2277, and *Rex v. Marshall*, 2 Chit. R. 370. It was rightly argued for the appellant that this section did not apply to the intervention of a new relator in order to prosecute the motion which was abandoned by the first relator.

But I see no provision in the statute law for the introduction of a new relator in such a case; and if the statute is silent, it does not devolve upon the Court to eke out the apparent insufficiencies of practice by judicial expedients: *Re Kelly v. Macarow*, 14 C. P. at p. 460.

Under English practice the power exists of substituting new relators by leave of the Court and on shewing special circumstances (as, *e.g.*, when the former relator had been obliged to go to the West Indies on business: *Regina v. Quayle*, 9 Dowl. 548.) And by the Crown Office Rules of 1886, No. 57, express provision is made for such a contingency; see also *Regina v. Alderson*, 11 A. & E. 3.

The indications of the statute are against such substitution; for the relator is only allowed to initiate the motion upon recognizance conditioned to prosecute with effect—and the allowing of one to intervene as a new defendant, in express terms, repels any implication that such a privilege is permitted as to the prosecution of the inquiry.

The original relator having quitted the field (and there

*196. The Judge before whom the motion is returnable may allow any person entitled to be a relator to intervene and defend, and may grant a reasonable time for the purpose; and an intervening party shall be liable or entitled to costs like any other party to the proceedings.

being no suggestion of collusion, but the negation of it), the law, as it now stands, supplies no means of compelling the first relator to go on against his will, or of transferring the motion to other hands. No great harm probably will result, as the office of alderman is an annual one, and on any future like occasion of complaint, a more trustworthy or courageous relator may be found who shall fight to the bitter end.

The appeal, therefore, presents no case for interference, or for costs, as Judge and alderman both erred as to the scope and meaning of the 196th section of the Consolidated Municipal Act of 1892.

Had the privilege of intervention on the part of the new relator existed, reasonable time should have been given to adjust the matter without putting it upon the appellant at once to elect his course. I should, besides, think it a right thing to amend the procedure so that there may be a new relator to prosecute in the public interest.

D'IVRY

V.

WORLD NEWSPAPER COMPANY OF TORONTO ET AL.

Discovery—Defamation—Production of Documents—Privilege—Criminating Answers—R. S. O. ch. 61, sec. 5—Incorporated Company—Indictment.

A person is protected against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards doing so ; the person however, or, in the case of a corporation, an officer, must pledge his oath to his belief that such would or might be the effect of his answer, and it must appear that such belief is likely to be well founded. The statute, R. S. O. ch. 61, sec. 5, has merely embodied the existing law as to the protection of a witness against answering questions tending to criminate, though including the case of a party examined as a witness or for the purpose of discovery.

In regard to affidavits of documents the same privilege exists as in regard to questions put to a witness or party.

The proposition that a corporation is not liable to an indictment for libel is at least so doubtful that it would not be proper to compel a newspaper publishing corporation to make production of documents on oath which might tend to subject them to a criminal prosecution.

Pharmaceutical Society v. London and Provincial Supply Association, 5 App. Cas. 857, specially referred to.

Legislation suggested, similar to 32 & 33 Vict. ch. 24 (Imp.), to afford an easy means of proving by whom a newspaper is published.

[March 16, 1897.—*The Court of Appeal.*]

AN appeal by the plaintiff from an order of a Divisional Court.

The action was for libel contained in *The World*, a public newspaper, and was brought against the above named incorporated company and W. F. Maclean, the manager of the company.

The usual affidavit on production of documents was made in the course of the action by the defendant Maclean, as manager of the defendant company. In it he stated that the company objected to produce the file of the *World* newspaper and all copies of the said newspaper containing the statements complained of, "because they are advised by their solicitor, and because I, as their manager, am also advised by their solicitor and believe, that the said documents are privileged, and that their pro-

duction might subject the said company, myself as their manager, or some one or more of their officers or members, to a criminal prosecution for the matters complained of herein."

The plaintiff moved for an order for a better affidavit, upon the ground that the documents referred to were not privileged and should be produced. His motion was dismissed by Mr. Cartwright, an official referee, sitting for the Master in Chambers, and the order dismissing it was affirmed by MEREDITH, J., in Chambers, on the 22nd January, 1897, and by a Divisional Court (ARMOUR, C.J., and FALCONBRIDGE and STREET, JJ.), on the 8th February, 1897.

The present appeal was from the order of the Divisional Court and was heard (by consent) before a Court composed of BURTON, OSLER, and MACLENNAN, JJ. A., on the 5th March, 1897.

H. M. Mowat, for the plaintiff, contended that the documents in question were not privileged from production; that the defendants had entered into a scheme to defeat proof of publication by denying to the plaintiff, upon examination for discovery, information as to who are in fact the publishers of the newspaper containing the alleged libel; that the defendants, by putting forward a particular officer to make an affidavit, could not prevent the plaintiff from obtaining discovery, which could be afforded by means of another officer who was not liable to a criminal prosecution; and that the defendant company, being an incorporated company, could not be exposed to a criminal prosecution for libel.

King, Q. C., for the defendants, contra.

Judgment was delivered on the 16th March, 1897.

BURTON, J. A.—The original motion before the Master in Chambers was for a further and better affidavit on production by the company defendants, which was refused.

That order was confirmed by Mr. Justice Meredith, and on further appeal to a Divisional Court, that appeal was dismissed, and the present motion is an appeal against that decision.

No written reasons were given by any of the Courts for their decisions, but we gather from the reasons and the argument before us that they proceeded on the ground that the production of the documents which the defendants object to produce might have a tendency to criminate the defendants.

It is contended by the appellant that she is entitled as of right to a full affidavit, and the production of the papers in question, and that the defendants cannot be allowed to defeat this right by putting forward an official who can swear that he is apprehensive that their production might tend to criminate him.

To that I should readily agree, but that scarcely states the actual state of facts existing here.

The defendant Maclean is the manager of the company, and therefore the proper officer to make the prescribed affidavit on the part of the company; if he had claimed protection for himself only, his affidavit would have been clearly insufficient, but, being the party authorized to act for the corporation, he claims protection on their behalf in these terms :

“The company object to produce the said documents, because they are advised by their solicitor, and because I, as their manager, am also advised by their solicitor and believe, that the said documents are privileged, and that their production might subject the said company, myself as their manager, or some one or more of their officers or members, to a criminal prosecution for the matters complained of herein.”

It is said that the privilege is a personal one, and cannot be invoked by any one except the witness, which is, as a general proposition, perfectly true; but this is a necessary exception—how otherwise could a corporation protect

itself? The defendant swears that the company is advised that the production would have a tendency to criminate the company; and the question seems, therefore, to resolve itself into whether the production could possibly have that tendency.

Mr. Mowat contended that a corporation aggregate is not capable of malice, and therefore could not be found guilty of a criminal libel; there may be some difference of opinion, but the weight of authority strongly preponderates against that view: see Lord Blackburn's remarks in *Pharmaceutical Society v. London and Provincial Supply Association*, 5 App. Cas. at p. 870: and that is sufficient, I think, to uphold the decisions of the Courts below.

The rule laid down by the Lord Chancellor in 1812 has always since been closely followed, where he uses this language: "The strong inclination of my mind is to protect the party against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards it:" *Paxton v. Douglas*, 19 Ves. at p. 227.

Whilst coming to this conclusion, I cannot avoid expressing my regret that the Legislature has not passed a general law compelling all newspapers to publish the names of the persons responsible for their publication, and thereby relieve persons aggrieved from the expense and trouble of ascertaining the parties actually responsible for the publication of the article of which they complain.

Such a provision is, I believe, contained in the charters of some of the leading papers, and I can see no good reason why it should not be made general.

I think, therefore, we must dismiss the appeal, but, under all the circumstances, we may properly follow the course taken in the Divisional Court, and do so without costs.

Perhaps there may not be so much difficulty in proving publication, as Mr. Mowat seems to imagine: see Lord Blackburn's remarks in *Regina v. Leatham*, 8 Cox C. C. at p. 501.

OSLER, J. A.—I have no doubt that we ought to dismiss this appeal. *Ranger v. Great Western R. W. Co.*, 4 DeG. & J. 74, lays down the practice as to an affidavit of production on behalf of a company. They cannot escape disclosure and production of documents in their possession merely by selecting some particular officer who may know nothing about them. The form is that “the defendants the company do file one or more sufficient affidavits to be made by one or more of their officers, stating whether they, the said defendants, have or have had in their possession or power,” etc. See also *Republic of Liberia v. Imperial Bank*, L. R. 16 Eq. 179.

That is altogether a different question from whether, on disclosure of their possession of any particular document, it is for any reason privileged from production, which is the only question raised on the present application. The manager of the company has made an affidavit in which he admits that the company have in their possession the documents of which production is sought, but on behalf of the company and of himself objects to produce them, on the ground that he believes such production might subject the company and himself to a criminal prosecution in respect of the matters complained of in the action. I have not considered whether or not the language in which protection is claimed is in other respects technically accurate, because no objection on that ground was taken. I have stated it as both parties understood it for the purpose of the argument, their object being to obtain the opinion of the Court upon the point really in dispute, viz., whether the defendants, having sufficiently admitted possession, had shewn a lawful excuse for non-production.

The 5th section of the Evidence Act, R. S. O. ch. 61, enacts that nothing in the Act shall render any person compellable to answer any question tending to criminate himself or to subject him to prosecution for any penalty. In *Paxton v. Douglas*, 19 Ves. 225, Lord Eldon's opinion was that a party was protected against answering any question, not only that had a direct tendency to criminate

him, but that formed one step towards doing so ; and this seems to be the law, with the qualification that the party or witness must pledge his oath to his belief that such would or might be the effect of his answer, and that it appears to the presiding Judge that, under all the circumstances, such belief is likely to be well founded : Taylor on Evidence, 9th ed., sec. 1457 ; *Lamb v. Munster*, 10 Q. B. D. 110.

The statute appears merely to have embodied the existing law as to the protection of a witness against answering questions tending to criminate, though including the case of a party examined as a witness or for the purpose of discovery.

Production of documents is not in terms provided against ; but on principle it would seem that there should be exactly the same privilege in regard to that as in regard to answering interrogatories or questions put to a witness or party, and the practice is so stated in Wigram on Discovery, pl. 290 ; Peile on Discovery, p. 49 ; Bray on Discovery, pp. 314, 347, 348. *Hill v. Campbell*, L. R. 10 C. P. 222 (1875), is a direct authority on the point, which has never been overruled or in terms disapproved of. It was followed in *Roe v. New York Associated Press*, 75 L. T. Jour. 31 (1883), notwithstanding the observations of the Judges of the Court of Appeal in *Webb v. East*, 5 Ex. D. 108 (1880), which indicate a doubt whether a party can protect himself from producing a document on the ground that its production would tend to criminate him. It was not necessary to decide the question in that case, and it is evident from what is said in the subsequent case and in the text books that the dicta referred to have not been regarded as governing the practice : *Hunnings v. Williamson*, 10 Q. B. D. 459. As to production upon subpœna *duces tecum*, see Roscoe's N. P., 16th ed., 1891, p. 154.

The plaintiff contends that a corporation is not liable to an indictment for libel, and therefore cannot be imperilled by production ; but, looking at sec. 302 of the Criminal Code, and the observations of Lord Blackburn in *Pharmaceutical*

Society v. London and Provincial Supply Association, 5 App. Cas. 857, it must be said that this proposition is at least so doubtful that it would not be proper to compel production.

I think it right to add that, from what we have seen in this case of the difficulties cast in the plaintiff's way in proving the publication in a newspaper of the libel in question, the law seems to require amendment, so that an easy means should be afforded of proving by whom—whether company or individual—the paper containing the libel was published: see 32 & 33 Vict. ch. 24 (Imp.).

MACLENNAN, J. A.—Having regard to the strong opinion expressed by Lord Blackburn in the House of Lords in *Pharmaceutical Society v. London and Provincial Supply Association*, 5 App. Cas. at p. 869, a newspaper publishing corporation, and their manager, may well believe that the company may be held criminally responsible for libel. That being so, such a company must be entitled to the same protection against discovery as an individual in an action of libel. Here the action is brought against the company and their manager, and the affidavit on production is made by the manager, and, as he is a proper officer to make production on the part of the company where production is obligatory, so also he is a proper person to claim protection on their behalf wherever they are entitled to protection; and of course he may do that on his own behalf as well as for the company, when production is also required of him, as it is here.

The terms on which the manager claims protection by his affidavit are as follows: "Because they (the company) are advised by their solicitor, and because I, as their manager, am also advised by their solicitor and believe, that the said documents are privileged, and that their production might subject the said company, myself as their manager, or some or one or more of their officers or members, to a criminal prosecution for the matters complained of herein." No objection was taken to the terms

of this statement before us, or, as far as appears, in the Court below. If it had, I should have been of opinion that it was insufficient, in saying merely that the company or the defendant or some other officer might be subjected to criminal prosecution. It is consistent with that that his belief is not in respect of either the company or himself, but only in respect of some or one or more of the other officers. The use of the word "herein" also might be criticised as not necessarily meaning in the action.

If those objections had been taken, I think a further affidavit ought to have been required, but not having been taken, I think effect should not be given to them at this stage. In other respects I think the affidavit satisfies the requirements of the law as it is laid down in *Lamb v. Munster*, 10 Q. B. D. 110, and other cases.

That the privilege extends as well, and to the same extent, to the production of documents on oath as to the answering of interrogatories and the giving of evidence, and may be claimed in the same way, is established by *Parkhurst v. Lowten*, 1 Mer. at pp. 400, 401; *S. C.*, 2 Swans. at p. 216; Taylor on Evidence, sec. 1464; Story's Eq. Jur., sec. 1494, and cases cited in note (2).

I think the appeal should be dismissed.

RE CENTRAL BANK OF CANADA.

Appeal—Leave—Order for Leave to Appeal.

An order giving leave to appeal is an order from which an appeal does not lie; and therefore leave to appeal from such an order will not be granted.

Re Sarnia Oil Co., 15 P. R. 347, *Ex p. Stevenson*, [1892] 1 Q. B. 394, 609, and *Kay v. Briggs*, 22 Q. B. D. 343, followed.

[March 9, 1897.—*Ferguson, J.*]

AN application by the executors and trustees under the will of G. R. Hogaboom, deceased, for an order under sec. 74 of the Winding-up Act, R. S. C. ch. 129, for leave to appeal to the Court of Appeal from the order of MEREDITH, J. (*ante* 370) granting the Receiver-General for Canada leave to appeal from an order of STREET, J.

The application was argued before FERGUSON, J., in Court, on the 4th March, 1897.

S. H. Blake, Q. C., for the applicants. We desire to present our case fully in the Court of Appeal, and not to be met there with the objection that we are concluded by the order of Meredith, J. That learned Judge was of opinion (see p. 372 of former report) that if his order was wrong, the Receiver-General's appeal would fail, because it would be really an appeal against the orders of Armour, C. J., without leave. What the applicants fear is that they will not be in a position to urge that the order is wrong, unless they have an appeal from it on foot. It is only fair, where the order in their favour is attacked, that they should have a free hand in defending it; they should be in a position in the Court of Appeal to present substantively whatever reasons they may be able to do to prevent the Receiver-General's appeal from succeeding.

W. R. Smyth, on the same side. The applicants desire to attack the leave granted to appeal from the refusal of Street, J., to allow leave to appeal from the orders of Armour, C. J., because there was no jurisdiction to grant

such leave; and to attack the leave to appeal from the remainder of the order of Street, J., as an erroneous exercise of discretion. Under sec. 74 they cannot be heard to take these objections in the Court of Appeal without leave.

Moss, Q. C., for the Receiver-General. There cannot be such an appeal as the applicants desire leave to bring. The policy of the Act is to prevent a multiplicity of appeals, or appeals upon unimportant matters. If leave were granted to appeal from the order of Meredith, J., why should not the Receiver-General then apply for leave to appeal from the order granting it, and so *ad infinitum*? It is clear upon the authorities that there is no appeal from such an order: *Kay v. Briggs*, 22 Q. B. D. 343; *The Amstel*, 2 P. D. 186; *Laine v. Esdaile*, [1891] A. C. 210; *Ex p. Stevenson*, [1892] 1 Q. B. 394, 609; *Re Sarnia Oil Co.*, 15 P. R. 347.

F. E. Hodgins, on the same side. Upon settling the order of Meredith, J., we offered to except from the leave granted the part of the order of Street, J., refusing to grant leave to appeal from the orders of Armour, C. J., but the applicants would not agree. I refer to sec. 39 of the Winding-up Act as shewing what the practice requires. No action is allowed to proceed when the winding-up order has been made, and it is proper and right that it should be so. As a matter of analogy, I refer to *Re Hall*, 8 A. R. at p. 149. If Meredith, J., had no jurisdiction, the Receiver-General has no leave to appeal, and the applicants do not need the leave they now ask.

Blake, in reply. I took the very same ground before Meredith, J., and cited to him the very same cases that are now cited against me, to shew that he had no power to make an order for leave to appeal from the order of Street, J.; but, as he has made such order, I should, I submit, be in a position to urge that he made it improperly. If I could agree that the applicants do not need the leave they now ask, I should not be here. There is no power to reconsider the leave refused by Street, J. See *Powell v. Peck*, 12 P. R. 34.

Judgment was delivered on the 9th March, 1897.

FERGUSON, J.—This is an application made under the provisions of sec. 74 of the Dominion Winding-up Act for leave to appeal to the Court of Appeal from an order made by Mr. Justice Meredith whereby the learned Judge granted leave to appeal from an order made in this matter by Mr. Justice Street. The order made by Mr. Justice Street bears date the 14th day of November, 1896, and the one made by Mr. Justice Meredith bears date the 22nd day of January, 1897. My brother Meredith seems not to have thought the order made by my brother Street substantially an order refusing leave to appeal. It appears, I think, from what he said in his judgment, that, had he considered it simply an order refusing leave to appeal from former orders made in the matter, he would not have made the order he did. Whatever question of this character may have existed there, nothing of the kind exists here, for the order of Mr. Justice Meredith is nothing more or less than an order granting leave to appeal, and I am asked to grant leave to appeal from it.

I have delayed for some time for the purpose of conferring with my brother Meredith, but have failed to obtain a conference with him, owing, as I am told, to his being ill.

The application was urged very strenuously, and I was strongly inclined to do anything in my power that would have the effect of bringing the whole matter of complaint in all its parts before the Court of Appeal.

I am, however, of opinion that it is shewn by the cases that the order made by my brother Meredith is an order from which an appeal does not lie; and, assuming this to be so, it would, as I think, be both foolish and wrong to grant leave to appeal.

The decision of the Chancellor in *Re Sarnia Oil Co.*, 15 P. R. 347, seems precisely in point. In the case cited in that case, *Ex p. Stevenson*, [1892] 1 Q. B. 394 and 609, Lord Esher seems to have stated the legal proposition with

great clearness. The case *Kay v. Briggs*, 22 Q. B. D. 343, seems also in point. Other cases were referred to on the argument which are to the same effect.

The application must, I think, be refused with costs.

Application refused with costs.

MONES & CO. V. MCCALLUM ET AL.

Receiver—Equitable Execution—Right to Bring Actions—Parties—Judgment Debtor.

A receiver appointed by the Court to aid a judgment creditor in recovering his claim, by receiving the judgment debtor's share in an estate which could not be reached by execution, after the refusal of the judgment debtor to allow the use of his name, was authorized, on giving security to him, to take proceedings in his name for the administration of the estate, and if necessary for the removal of the executor. Decision of *BOYD, C.*, *ante* 356, reversed.

[March 12, 1897.—*Divisional Court.*]

AN appeal by the plaintiffs, Mones & Co., from the order of *BOYD, C.*, (*ante* 356), dismissing a motion by the appellants for leave to bring an action in the name of the defendant William A. McCallum, either alone or jointly with the receiver, against the executors of the will of the father of the defendant William A. McCallum, for an administration of the estate, and to have the executors removed for breaches of trust.

In this action the plaintiffs, having recovered against the defendants a judgment which they were unable to realize by ordinary execution, obtained an order for the appointment of Mr. Sheriff Cameron as receiver of the interest of the defendant William A. McCallum in the estate of his deceased father. The sole acting executor under the will of the father resided in Philadelphia, in

the United States of America, and it was alleged that he refused to give an account of his dealings with the estate.

The receiver then applied *ex parte*, in Chambers, for leave to bring an action for the administration of the estate, and leave was granted : (*ante* 102.)

Pursuant to this order, an action was brought by the receiver in his own name, instead of in the name of the judgment creditors.

In that action, *Cameron v. McLean et al.*, an application was made to BOYD, C., at the same time as the application in this action. Both applications were refused, but the present appeal related only to the application in this action.

The plaintiffs' appeal was argued on the 12th and 15th February, 1897, before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.

Idington, Q. C., for the appellants, cited *McGuin v. Fretts*, 13 O. R. 699 ; *Re Morphy*, 11 P. R. 321 ; *McLean v. Bruce*, 14 P. R. 190 ; *McLean v. Allen*, 14 P. R. 84, 291 ; *Allen v. Furness*, 20 A. R. 34 ; *Salt v. Cooper*, 16 Ch. D. 544 ; *Smith v. Cowell*, 6 Q. B. D. 75 ; *Stuart v. Grough*, 14 O. R. 255, 15 O. R. 66, 15 A. R. 299 ; *Taylor v. Allen*, 2 Atk. 213 ; *Utterson v. Mair*, 4 Bro. C. C. 270, 2 Ves. Jun. 95 ; *Burroughs v. Elton*, 11 Ves. 29 ; *Dacie v. John*, McCle. 206 ; *Pitt v. Snowden*, 3 Atk. 750 ; *Hughes v. Hughes*, 3 Bro. C. C. 87, 1 Ves. Jun. 161 ; *Armstrong v. Armstrong*, L. R. 12 Eq. 614 ; *Hobson v. Sherwood*, 19 Beav. 575 ; *Doe Marsack v. Read*, 12 East 57 ; *In re Hopkins*, 19 Ch. D. 61 ; *Pease v. Fletcher*, 1 Ch. D. 273 ; *In re Johnson*, L. R. 1 Ch. 325 ; *In re Babcock and Brooks*, 9 U. C. L. J. O. S. 185 ; *Young v. Wright*, 8 P. R. 198 ; *Thomas v. Torrance*, 1 Ch. Chamb. R. 9 ; *Re Neill*, 9 P. R. 176 ; *Yescombe v. Landor*, 28 Beav. 80 ; *Curling v. Townshend*, 19 Ves. 628.

E. R. Cameron, for the defendant William A. McCallum, referred to *Ewing v. Orr Ewing*, 10 App. Cas. 453 ; *Neate v. Marlborough*, 3 My. & Cr. 407 ; *Flegg v. Prentis*, [1892] 2 Ch. 428 ; *Central Bank v. Ellis*, 27 O. R. 583 ; *Re Shephard*, 43 Ch. D. 131 ; *Gilbert v. Jarvis*, 16 Gr. 265 ; *Fisken v. Brooke*, 4 A. R. 8.

On the 12th March, 1897, the judgment of the Court was delivered by

STREET, J.—The plaintiffs are judgment creditors ; one of their judgment debtors is entitled to a share in the estate of his father, which cannot be reached by execution. A receiver has already been appointed to aid the plaintiffs in recovering their claim by receiving this share ; but the executor refuses to give an account, and the judgment debtor refuses to compel him to do so. Under these circumstances, the plaintiffs ask for an order allowing the receiver to bring an action in the name of the judgment debtor to compel the executor to account. If we are unable to do this, it is plain that the debtor and the executor may set the receiver and the judgment creditors at defiance by simply refusing to do anything at all. Unless there is some well established principle restraining a receiver under such circumstance from taking active steps for the recovery of the money which he was appointed to receive, we should not render his appointment nugatory by so tying his hands. It is true that no case has been cited to us, I think, in which an English or Canadian Court, in order to aid the recovery of a creditor's debt, has allowed a receiver to proceed in the debtor's name ; but I have found nothing to lead me to the conclusion that such a proceeding has been considered objectionable in principle.

I cannot find that the duties of a receiver, appointed under such circumstances as exist in the present case, differ in any respect from those of a receiver appointed to take charge of the estate of a deceased person, or to wind up the affairs of a partnership. He is to get in the estate for the benefit of those who may be found entitled, and, if it be necessary to bring actions for the recovery of any of the assets, he is from time to time authorized to bring such actions in the name of the proper parties, whether they be plaintiffs or defendants, and whether they be willing or unwilling : *Taylor v. Allen*, 2 Atk. 213 ; *Bellis v. Jones*, cited in Daniell's Chancery Forms, 2nd ed. by Biddle, form

1854; *Ex p. Little*, 3 Moll. Ch. Rep. 67; *In re Merritt*, 5 Paige 125; *Mullane v. Ahern*, 28 L. R. Ir. 105; *Stuart v. Grough*, 14 O. R. 255; *McLean v. Allen*, 14 P. R. 291; *Ex p. Harris*, 2 Ch. D. 423.

The practice of allowing a receiver who is an officer of the Court to use the name of any party to the litigation for the purpose of performing his duty of collecting the assets of which he is appointed receiver, is clearly recognized in many of these cases, without at the same time giving any support to the idea that a plaintiff is entitled to use the name of the defendant against his will for any purpose whatever, without the intervention of an officer of the Court. At the same time, however, the practice seems well established that a receiver is not to be treated as the assignee of any rights of any party to the estate or litigation in respect of which he is appointed (with the exception perhaps of negotiable securities), and that he should, therefore, not appear as a party to the litigation.

I think, therefore, with great respect that the receiver should have leave to take proceedings in the name of the defendant W. A. McCallum for the administration of the estate of Alexander McCallum, deceased, and, if necessary, for the removal of the executors and the appointment of other persons in their place, and either by action or motion.

But before proceeding in any way under this order, the plaintiffs must give to W. A. McCallum security against his liability for the costs of the proceedings, in the amount of \$400, by bond, with two sufficient securities to be approved by the Master at Stratford, with liberty to the said W. A. McCallum to apply from time to time for such further security as may appear necessary to save him harmless.

The plaintiffs should be allowed to add the costs of the present application and appeal to their judgment debt.

RE CASSIE.

TORONTO GENERAL TRUSTS CO. V. ALLEN ET AL.

Costs—Will—Appeal—Costs out of Estate—Watching Brief.

The costs of opposing an unsuccessful appeal to the Court of Appeal from a judgment establishing a will and codicil were ordered to be paid to the respondents, who were the executors, and certain legatees, out of the estate, in the event of their not being able to make them out of the appellant; the costs of the executors to be only as on a watching brief.

[March 18, 1897.—*The Court of Appeal.*]

THE plaintiffs, the executors under the will of Pamela Cassie, propounded the will and codicil for probate in a Surrogate Court, and the grant sought being opposed by the defendant Hannah Maria Allen, an order was made removing the proceeding into the High Court.

The case was tried before ROSE, J., who gave judgment establishing both the will and codicil.

The defendant Allen appealed to the Court of Appeal, and her appeal was argued before a second division composed of BOYD, C., and FERGUSON and ROBERTSON, JJ., on the 11th March, 1897.

The appeal was dismissed with costs.

Hamilton Cassels, for the Presbyterian Church in Canada and Knox College, legatees under the will, and respondents to the appeal, and *W. C. Chisholm*, for the plaintiffs and for the Presbyterian Church at Port Hope, also legatees under the will and respondents, asked that an order should be made providing that, in the event of their not being able to make their costs out of the appellant, their costs should be paid out of the estate. They referred to *Cross v. Cross*, 3 Sw. & Tr. 292.

W. R. Riddell, for the appellant.

Judgment on this question was delivered on the 18th March, 1897.

BOYD, C.—In this case the will and codicil were propounded for proof in solemn form by the executors, the plaintiffs, at the instance and upon the opposition of the defendant Allen, a legatee and beneficiary. Pending the proceedings certain religious corporations, legatees, were made parties by order of the Court, and actively intervened in supporting the testamentary instruments.

At the hearing the will and codicil were upheld and costs awarded out of the estate to the executors and interveners aforesaid, and no costs to the contesting defendant.

This defendant has appealed and failed in her appeal, and it is asked, as it is doubtful whether costs can be levied from her, that the costs of the respondents the executors and the corporations be paid out of the estate. There is no fixed rule in such cases, and there are authorities supporting what is asked. I think it reasonable to grant such costs to those who supported the will for the benefit of the estate, out of that estate, if they cannot be made out of the defendant the appellant. The interveners took the labouring oar on the appeal, and should be allowed the usual costs, and the executors their costs as on a watching brief, both out of the estate, if the defendant does not answer them.

FERGUSON and ROBERTSON, JJ., concurred.

HOFFMAN V. CRERAR ET AL.

Discovery—Production of Documents—Affidavit—Privilege—Confidential Communications—Solicitor and Client—Application for Better Affidavit.

In an affidavit of a party on production of documents, a certain letter was described by its date and as being from a firm of solicitors to the deponent, who said that he objected to produce it, that it was a communication between solicitor and client, and was privileged:—

Held, doubting, but following *Hamelyn v. White*, 6 P. R. 143, that the statement was sufficient to protect the document from production.

In the same affidavit two other letters were described by their dates and as being from a solicitor to a firm of solicitors, and a copy of a letter written in answer to one of them was similarly described. These documents, the affidavit stated, were in the possession of the solicitors for the deponent and others in another action, and he objected to produce them and claimed privilege for them “on the ground that they are communications between solicitor and client and between my solicitors and others in the course of their conducting my business:”—

Held, that these letters not being written to or by the deponent, there was no reasonable intendment that the deponent was the “client” referred to, nor that they were necessarily confidential because they were written by the deponent’s solicitors to other persons in the course of their conducting his business; and the opposite party was entitled to a better affidavit on production, in which the deponent might set up other grounds of protection.

It is irregular to go into the merits upon an application for a better affidavit.

Morris v. Edwards, 23 Q. B. D. 287, followed.

[March 18, 1897.—*Street*, J.]

AN order having been taken out by the plaintiff for the production of documents by the defendants, the defendant Crerar filed an affidavit in which he admitted having in his possession a certain letter, described in the second part of the first schedule A, on the ground “that the same is a communication between solicitor and client, and is privileged.” In subsequent paragraphs of his affidavit, he deposed as follows:—

“6. That there are, I am informed and believe, in the possession of Messrs. Idington & Palmer, solicitors for me and others in a certain suit of *Crerar et al. v. Holbert et al.*, the documents relating to the matters in question herein set forth in the first and second parts of the third schedule hereto.

“7. I object to produce the said documents set forth in the second part of the said third schedule hereto.

"8. That the documents last mentioned are, I claim, privileged from production, on the ground that they are communications between solicitor and client, and between my solicitors and others in the course of their conducting my business."

The documents specified in the second part of the third schedule were two letters from J. G. Wallace to Idington & Palmer, dated 24th and 28th April, 1896, and copy of letter from Idington & Palmer to J. G. Wallace, dated 25th April, 1896.

The plaintiff's solicitor then filed affidavits of himself and one of his clients controverting the statements in the affidavit of Crerar on production of documents, and moved before the local Judge at Stratford for an order for a better affidavit on production; these affidavits were answered by the defendant Crerar and his solicitor. In the latter affidavit the solicitor stated that the letters mentioned in the second part of the third schedule were in the possession of his firm for a number of persons, of whom the defendant Crerar was one, and that they would not hand them to him or produce them for him unless ordered to do so by the Court. Upon these affidavits the local Judge ordered the defendant Crerar to file a better affidavit on production, and to produce the letters mentioned in the second part of the third schedule, but not the letter described in the second part of the first schedule, and ordered that the costs of the application should be costs in the cause.

Both parties appealed, and the appeals were argued before STREET, J., in Chambers, on 12th March, 1897.

J. H. Moss, for the defendant Crerar.

D. L. McCarthy, for the plaintiff.

Judgment was delivered on the 18th March, 1897.

STREET, J.—The first document for which the defendant Crerar claims protection is thus described in the second part of the first schedule to his affidavit on production :

“Letter of Idington & Palmer to me, dated 25th April, 1896.”

In his affidavit he says that he objects to produce it; “that the same is a communication between solicitor and client, and is privileged.”

I am unable to distinguish the case upon these statements from *Hamelyn v. White*, 6 P. R. 143, in which the present Chief Justice of the Supreme Court held documents so described to be sufficiently protected from production, following a dictum of Lord Selborne’s in *Minet v. Morgan*, L. R. 8 Ch. 361, that the description of the documents contained, by reasonable intendment, an assertion that the communication was between solicitor and client in that character. But for *Hamelyn v. White* I should have thought the description in the present affidavit an insufficient one: *Gardner v. Irvin*, 4 Ex. D. 49; *Taylor v. Bat-ten*, 4 Q. B. D. 85; *Morris v. Edwards*, 23 Q. B. D. 287.

The documents set forth in the second part of the third schedule are in a different position. They are not written to or by the deponent, and there is no reasonable intendment therefore that the deponent is the “client” referred to, nor that they are necessarily confidential because they were written by the deponent’s solicitors to other persons in the course of their conducting the deponent’s business. The evil of allowing such loose statements to be treated as sufficiently protecting documents is here exemplified; it is admitted before me that the documents in question in fact passed between the solicitors on opposite sides in a former litigation, and that the protection claimed on that ground cannot be supported.

The plaintiff is entitled to a better affidavit on production; the matter is not in a position yet to enable me to determine whether the plaintiff is entitled to production. The defendant Crerar has been allowed to file affidavits upon the motion setting up a new ground of protection, and the plaintiff is entitled to a better affidavit from the defendant himself, setting up these grounds, before I can hold either that the letters mentioned in the

second part of the third schedule are protected, or that they should be produced.

The order of the learned local Judge will, therefore, be amended by striking out so much of it as orders the production of the last mentioned documents. The plaintiff will have the costs of the motion for a better affidavit, to be taxed to him in any event, and there will be no costs either of the appeal or the cross-appeal. In taxing the costs of the motion in the Court below, it is to be borne in mind that the only affidavit which should be taxed to the applicant is one verifying the copy of the affidavit on production, and the fact that no other affidavit on production had been filed. It is irregular to go into the merits upon an application for a better affidavit on production: *Morris v. Edwards*, 23 Q. B. D. 287.

RE WILSON.

TRUSTS CORPORATION OF ONTARIO V. IRVINE.

Appeal—Surrogate Court—Time—Security—Deposit of Cheque—Affidavit—R. S. O. ch. 50, sec. 33—Surrogate Rule 57.

The plaintiffs, desiring to appeal to the Court of Appeal from an order of the Judge of a Surrogate Court, made on the 4th October, 1895, served notice of appeal on the fifteenth day thereafter, and on the same day deposited with the registrar of the Surrogate Court as security an unmarked cheque on a bank for \$100, payable to the order of the registrar, who simply retained it in the office and never cashed it. No other security was given, and no affidavit of the amount of the property to be affected by the order was filed:—

Held, that what was done was not such a compliance with the requirements of Rule 57 of the Surrogate Rules of 1892 that the appeal was thereby lodged and brought within fifteen days, as required by sec. 33 of the Surrogate Courts Act, R. S. O. ch. 50; and the appeal was quashed with costs.

[March 2, 1897.—*The Court of Appeal*.]

MOTION by the defendant to quash the appeal of the plaintiffs to this Court from an order of the Judge of the Surrogate Court of the united counties of Stormont, Dundas, and Glengarry, refusing to allow the plaintiffs to use

at the trial of this action certain depositions taken in Scotland in a previous action in the High Court.

This action was brought in the Surrogate Court, and the claim was that a grant to the defendant of letters of administration of the estate of Charlotte Wilson, a deceased intestate, should be revoked, and a grant made to the plaintiffs

The order appealed against was made on the 4th October, 1895. On the 19th October, 1895, the plaintiffs served notice of appeal to this Court, and on the same day the agents at Cornwall of the plaintiffs' solicitors deposited with the registrar of the Surrogate Court a cheque for \$100 drawn upon a bank at Cornwall, payable to the registrar, signed by the agents, and marked "security for costs of appeal" in this action, but not certified by the bank. No other security of any kind was given. The cheque was not cashed by the registrar, but remained in the office. One of the agents who deposited the cheque swore that he expected the registrar to cash it, and made no request that it should not be cashed, and that funds to pay it were at the time it was drawn, and ever since, upon deposit in the bank. No affidavit was filed by the appellants to shew the value of the property.

Upon a motion made by the defendant before the Judge of the Surrogate Court to dismiss the action for want of prosecution, the Judge on the 27th July, 1896, made an order requiring the plaintiffs to prosecute their appeal and set it down for hearing at the Sittings beginning 10th November, 1896. The appeal was accordingly set down on the 28th October, 1896.

The motion to quash the appeal and the appeal itself were heard by BURTON, OSLER, and MACLENNAN, JJ.A., on the 25th November, 1896.

Du Vernet, for the defendant.

D. W. Saunders, for the plaintiffs.

Judgment was delivered on the 2nd March, 1897.

MACLENNAN, J. A.—I have come to the conclusion, I

confess with regret, after all the expense which has been incurred, that we must give effect to Mr. DuVernet's motion to quash this appeal.

I think it has never been lodged in this Court as required by the statute and the Rules of Court. Section 33 of the Surrogate Act, ch. 50, R. S. O., gives an appeal from orders of the Surrogate Court when the value of the property exceeds \$200, but it is to be brought within fifteen days after the date of the order. Rule 57 of the Surrogate Rules of 1892 requires security for the prosecution of the appeal, and for the costs thereof, in case of failure, to the amount of \$200, to be given by bond with justifying sureties; and also requires an affidavit to be filed that the property to be affected by the order complained of is over the value of \$200. It then provides that if such bond and affidavits be made and filed, and if a notice of appeal be served within fifteen days after the making of the order, the appeal shall be held to be duly lodged. It is then provided that the appellant may pay into Court a sum of money not less than \$100 in lieu of the prescribed bond. After all that is done, the papers in the case are to be transmitted to the Court of Appeal. Mr. DuVernet contended that the appeal had never been properly lodged for non-observance of the requirements of this Rule. What was done was this. Notice of appeal was duly served on the fifteenth day. On the same day a cheque on a bank signed by the solicitors of the appellants, and payable to the order of the clerk of the Court, was filed in the office, where it still remains. No other security was given, and no affidavit of the amount of the property to be affected by the order was filed. I think it impossible to hold that what was thus done was such a compliance with the requirements of the Rule that the appeal was thereby lodged, or brought within fifteen days, as allowed by the statute.

I therefore think the appeal must be quashed with costs.

BURTON and OSLER, J.J.A., concurred.

LEYBURN V. KNOKE.

LEYBURN V. HERBORT.

Notice of Trial—Jury Sitings—Non-jury Sitings—Default—Judicature Act, 1895, sec. 88—Rule 647.

Where an action is to be tried without a jury, and two Spring or Autumn Sitings have been appointed at the place of trial, one for the trial of actions with, and the other without a jury, the plaintiff, although by sec. 88 of the Judicature Act, 1895, he can have his action tried at the jury sittings, is not in default under Rule 647 by reason of his not giving notice of trial therefor, where the non-jury sitings, for which he intends to give notice of trial, is to be held at a later date.

[April 5, 1897.—*Rose, J.*]

AN appeal by the plaintiff from an order of Mr. Cartwright, an official referee, sitting for and at the request of the Master in Chambers. The motion before the referee was one by the defendants, under Rule 647, to dismiss the actions for want of prosecution. Stratford was the place of trial named in the statement of claim in both actions. A sittings at that place for the trial of actions with a jury had been appointed to begin on the 22nd March, 1897, and a sittings for the trial of actions without a jury for the 31st May, 1897. The default alleged by the defendants consisted in the plaintiff not giving notice of trial for the earlier sittings, the pleadings having been closed for six weeks before the day of its commencement.

By sec. 88 of the Judicature Act, 1895, non-jury actions might be entered for trial at any sittings. These actions were admittedly actions properly triable without a jury. The order of the referee was that the defendants' application should be dismissed upon the plaintiff undertaking to go down to trial at the Stratford non-jury sittings in May, and that the costs of the application should be costs to the defendants in the action.

The appeal was argued before ROSE, J., in Chambers, on the 2nd April, 1897.

D. L. McCarthy, for the plaintiff, contended that he was not in default, and could not be until the time for giving notice of trial for the non-jury sittings should have expired.

R. Hodge, for the defendants, contended that under the wording of Rule 647 the plaintiff was in default for not giving notice of trial for the March sittings.

Judgment was delivered on the 5th April, 1897.

ROSE, J.—I am clearly of the opinion that the defendants had no reasonable ground of complaint upon which to found the motion before the learned referee. The actions were non-jury actions, admittedly. The place named for trial was Stratford, which has sittings for the trial of jury and also separate sittings for the trial of non-jury actions. The default alleged was in not giving notice of trial for the sittings for the trial of jury actions on the 22nd March. The sittings for the trial of non-jury actions is appointed for the 31st May. The plaintiff's intention was to give notice of trial for the non-jury sittings.

The Judicature Act of 1895, sec. 88, provides that "all non-jury actions in any county may be entered for trial at any sittings of the High Court in such county, except in the county of York." Prior to the passing of this section, a non-jury action might not be entered for trial at a sittings for the trial of jury actions. It was not the intention, as I understand it, to compel parties to take non-jury actions down for trial at jury sittings. Section 88 was passed as a permissive section to give increased facilities for the disposition of actions where expedition was necessary.

It is manifestly more convenient in many cases that non-jury actions should be tried at the sittings appointed specially for such purpose, for the reason, among others, that the litigants will not be kept in attendance with their witnesses while the jury actions are being disposed of. This reason was so potent with reference to the county of York, that that county is expressly excepted from the operation of sec. 88.

If here it was of any particular consequence to the defendants that the actions should have been entered for

trial at the sittings for the trial of jury actions on the 22nd March, they might have given notice of trial under Rule 654. They seemed to be more anxious to have the actions dismissed than to have them tried.

Rule 647 (1348), under which the motions were launched, says that "if the pleadings are closed six weeks before the commencement of any sittings of the High Court for which the plaintiff *might* give notice of trial, and he does not give notice of trial therefor, * * the action *may* be dismissed for want of prosecution." But, in my opinion, the actions should not have been dismissed for want of prosecution, nor should the plaintiff have been punished for not bringing them down for trial until both the sittings appointed for the Spring were past, or rather until the time for giving notice of trial for such sittings was past.

I do not see the necessity for this motion. I cannot understand its reasonableness. It must have been apparent to the defendants that no action would be dismissed upon such facts as these, and the only result that could be hoped for would be to have an order for costs; for if it was desired to have it imposed as a term that the plaintiff should go down to the next sittings, that result might have been obtained by the defendants giving notice of trial for such sittings.

I think that no terms should have been imposed upon the plaintiff, that the motion should have been dismissed, and that the defendants should have been ordered to pay the costs. The plaintiff's counsel stated before me that the plaintiff did intend and had intended to give notice of trial for the non-jury sittings. I assume such to be the fact.

I think the order must be set aside with costs in the cause to the plaintiff in any event.

I am permitted to add that having conferred with the president of each of the three Divisions, they agree to the conclusion at which I have arrived.

BELAIR V. BUCHANAN.

Security for Costs—Plaintiff out of the Jurisdiction—Property in the Jurisdiction.

Where the plaintiff lived out of the jurisdiction, but had real property in the jurisdiction, incumbered, but of the value of \$510 over and above all incumbrances and all debts that it was shewn or suggested that he owed, a *præcipe* order for security for costs was set aside.

[March 9, 1897.—*Ferguson, J.*]

AN appeal by the plaintiff from an order of Mr. Cartwright, an official referee, sitting for the Master in Chambers, dismissing an application by the plaintiff to set aside a *præcipe* order for security for costs, in an action for false imprisonment. The plaintiff lived out of the jurisdiction, but was the owner of certain farming lands in the jurisdiction, valued at \$1,575, subject to an incumbrance of \$960. This was shewn by an affidavit filed by the plaintiff, and was not contradicted. The plaintiff did not negative the existence of debts and liabilities in Ontario, but the defendant did not affirm that any such existed. It appeared, however, that the defendant had recovered judgment against the plaintiff in a Division Court for \$140.

The appeal was argued before FERGUSON, J., in Chambers, on the 5th March, 1897.

Walter Read, for the plaintiff, contended that he had property in the jurisdiction sufficient to answer costs. He referred to *Bready v. Robertson*, 14 P. R. 7; *Galt v. Spenser*, 2 Ch. Chamb. R. 92; *White v. White*, 1 Ch. Chamb. R. 48; *Ebrard v. Gassier*, 28 Ch. D. at p. 235; *Hamburger v. Poetting*, 30 W. R. 769; *Re Apollinaris Co.*, [1891] 1 Ch. 1.

James Bicknell, for the defendant, contended that an equity of redemption was not satisfactory security for costs, and that the plaintiff should have negatived the existence of debts and liabilities.

Judgment was delivered on the 9th March, 1897.

FERGUSON, J.—It is shewn that the plaintiff has in this country real property. The least value put upon this is the sum of \$510, over and above all incumbrances, and above all debts that it is shewn or suggested that the plaintiff owes. The argument that this could probably not be readily available in money, that is, turned into money to pay costs, has in itself much force, but that is an argument that at the present time would apply to any property.

After a perusal of the cases, I am of the opinion that this appeal should be allowed, and the præcipe order for security for costs set aside. The costs of the application in Chambers before the learned referee and the costs of this appeal to be costs in the cause.

CAMERON V. ELLIOTT.

Venue—Change of—County Court Action—Rule 1260—Second Application—Appeal—Law Courts Act, 1895, sec. 9 (2).

Where in a County Court action an application has been made to the Master in Chambers, under Rule 1260, to change the place of trial, no appeal lies from his order; and a second application for the same purpose, not based upon any new state of facts arising since the first application was made, will not be entertained by a Judge in Chambers.

McAllister v. Cole, 16 P. R. 105, followed.

Milligan v. Sills, 13 P. R. 350, not followed, with the concurrence of the Judges who decided it, pursuant to sec. 9 (2) of the Law Courts Act, 1895.

[March 19, 1897.—*Meredith*, C.J.]

MOTION by the defendants under Rule 1260 to change the place of trial in an action brought in the County Court of the county of Huron from Goderich to Toronto, or, in the alternative, by way of appeal, to set aside the order of Mr. Cartwright, an official referee, sitting in the place of the Master in Chambers, refusing, subject to terms as to the payment by the plaintiff of the additional expense occasioned by a trial at Goderich, the application for the same purpose made to him.

The action was brought by a barrister against a solicitor to recover counsel fees. At the time the services were performed by the plaintiff he resided in Toronto, where also the defendant resided, but the plaintiff had since removed to Goderich, and brought the action there.

The motion was argued before MEREDITH, C. J., in Chambers, on the 26th February, 1897.

W. E. Middleton, for the plaintiff, raised the objection that under Rule 1260* the Master in Chambers, or an official referee sitting for him, has co-ordinate jurisdiction with a Judge of the High Court, and there is no right to

*1260. In all actions brought in a County Court the Judge of the County Court where the proceedings are commenced, or the Master in Chambers, or one of the Judges of the High Court sitting at Chambers may change the place of trial according to the practice now in force in the High Court; * * .

make a second application to a Judge for the same order which has been refused by the officer, and no right of appeal.

Beatty (*W. J. Elliott*), for the defendant, in answer to the objection cited *Milligan v. Sills*, 13 P. R. 350.

The motion was also argued on the merits subject to the objection.

Judgment was delivered on the 19th March, 1897.

MEREDITH, C. J.—It was determined by the Divisional Court in *McAllister v. Cole*, 16 P. R. 105, that an appeal does not lie from an order of the Master in Chambers under Rule 1260, and it follows from that that an appeal does not lie from the officer sitting in his place, and the appeal therefore fails.

Then, as to the other branch of the application, it is a second application for the same purpose as that made to the official referee, which he, after argument and upon full consideration, refused, and it is not based upon any new state of facts which has arisen since the first application was made.

The practice of the Court forbids the making of a second application under these circumstances: Archbold's C. L. Practice, 13th ed., p. 1267.

It may be that, under special circumstances, a second application may be made, but, even if it be competent for the party to make it, a wide discretion is allowed to the tribunal to which the second application is made in granting or refusing it.

Every reason of convenience as well as of principle, I think, is against allowing a second application to be made where an unsuccessful one has already been made, either to the Judge of the County Court, the Master in Chambers, or to a Judge of the High Court, under Rule 1260. If I may—although there is no appeal from the order of the Master in Chambers—grant on a second application what he has refused, I know of no reason why, had the

order of the applications been reversed, the Master in Chambers might not, on the very same material which a Judge of the High Court had held to be insufficient to justify the making of an order, make the order himself. I cannot think that a practice which would permit such a state of things to occur is a desirable one; and, though I should, on the material before me, had the application come before me in the first place, have changed the place of trial as asked, I must refuse to do so in this case.

It was argued that the case of *Milligan v. Sills*, 13 P. R. 350, is an authority for my making the order, but in that case the point raised by the plaintiff in this case does not appear to have been fully argued, and the learned Chief Justice of the Queen's Bench, who delivered the judgment of the Court, with whom I have conferred, does not think the decision one which, according to the provisions of sec. 9 (2) of the Law Courts Act, 1895, prevents me from coming to what I take to be the proper conclusion according to the practice of the Court.

I am further of opinion that the reasoning upon which the decision in *McAllister v. Cole* proceeded leads necessarily to the result that, having applied to one of the tribunals which, under the Rule, have power to change the place of trial, the provisions of the Rule were exhausted, and no application could be made to another of them; in other words, that the defendant elected to apply to the Master in Chambers, and having done so, his right under the Rule was spent, and no new application could be made either to a Judge of the High Court or to a Judge of the County Court.

The motion must, therefore, be dismissed, but, under the circumstances, and as the defendant may have been led to move relying on *Milligan v. Sills*, the costs will be costs in the cause.

DICKERSON ET AL. V. RADCLIFFE ET AL.

Pleading—Defamation—Trade-Libel—Action on the Case—Trial by Jury—Judicature Act, 1895, sec. 109.

An action for words written and published relating to articles of the plaintiffs' manufacture and the rights of the plaintiffs under certain letters patent by virtue of which they claimed a monopoly of the manufacture and sale of the articles, is not an action of defamation properly so called, but an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiffs, and does not come within sec. 109 of the Judicature Act, 1895, so as to be triable only by a jury, unless by consent.

[April 5, 1897.—*Meredith*, C. J.]

AN appeal by the defendants from an order of Mr. Cartwright, an official referee, sitting for the Master in Chambers, dismissing a motion by the defendants to set aside for irregularity a notice of trial given by the plaintiffs for a sittings for the trial of actions without a jury, or, in the alternative, to strike out the 15th paragraph of the statement of claim, on the ground that it asserted a cause of action for defamation of the plaintiffs by certain circulars or publications of the defendants, the other claims in the action being for infringement of a patent and for breach of contract.

The appeal was argued before MEREDITH, C. J., in Chambers, on the 26th February, 1897.

J. B. Holden, for the defendants.

J. Bicknell, for the plaintiffs.

Judgment was delivered on the 5th April, 1897.

MEREDITH, C. J.—The question raised on this appeal is whether the cause of action set out in the 15th paragraph of the statement of claim is for libel within the meaning of sec. 109 of the Judicature Act, 1895, so as to be triable only by a jury, unless by consent of the parties.

The cause of action in question is for words written and published relating to articles of the plaintiffs' manu-

facture and the rights of the plaintiffs under certain letters patent, which they claim give them a monopoly of the manufacture and sale of the articles; and the words cast no imputation upon the plaintiffs themselves, nor is it, as the plaintiffs' counsel stated and as he undertook, intended to claim that they do.

Such an action is not one of defamation properly so called, but an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiff: *Odgers on Libel and Slander*, 3rd ed., p. 145.

As the defendants have not filed a jury notice, the notice of trial was properly given for the non-jury sittings, and the order appealed from was rightly made.

The appeal is dismissed; costs to be costs in the cause to the plaintiffs in any event.

ROBINSON V. SUGARMAN.

Pleading—Defamation—Trade-Libel—Action on the Case—Particulars—Slander—Examination of Party.

The plaintiff, a tradesman, claimed damages for injury to his credit and business by reason of the defendant having sent certain hand-bills issued by the plaintiff, advertising his business, to various wholesale creditors of the plaintiff, and having written and published letters to such creditors falsely and maliciously charging that the plaintiff was advertising his business and unduly forcing sales with the view of selling and disposing of his goods to defeat and defraud his creditors:—

Held, that the action was for libel, and not in case for disturbing the plaintiff in his calling, and the defendant was entitled to have the words of the alleged libel set out in the pleading.

Flood v. Jackson, [1895] 2 Q. B. 21, and *Riding v. Smith*, 1 Ex. D. 91, specially referred to.

The plaintiff also alleged that at a certain city, in a certain month and year, the defendant falsely and maliciously spoke and published of the plaintiff certain specified words:—

Held, that the defendant was entitled to some particulars as to the times when and the places where the defamatory words were used, and as to some of the persons in whose hearing they were alleged to have been spoken.

Winnett v. Appelbe, 16 P. R. 57, distinguished.

Held, also, that the plaintiff should have leave to examine the defendant before delivering particulars, in order to enable him to furnish them.

[February 11, 1897.—*Mr. Cartwright*.]

[April 7, 1897.—*Meredith, C. J.*]

AN application by the defendant for an order striking out the statement of claim as embarrassing, or for an order

* striking out paragraphs 3, 4, 5, and 6, and for particulars of paragraph 7, or for an order striking out paragraphs 3, 5, and 6, and for particulars of paragraphs 4, 7, and 8.

The statement of claim was as follows:—

1. The plaintiff is a merchant carrying on business in the city of Stratford, and the defendant a merchant carrying on business in the town of Berlin.

2. The plaintiff has for four years been carrying on a large dry goods store at Stratford, and for two years a large dry goods store at the village of Chesley.

3. The plaintiff, in connection with his business, was a large purchaser from various wholesale houses in Hamilton, London, Toronto, and Montreal, and usually had large accounts with such houses, and at the time hereinafter mentioned owed large sums to such houses for goods purchased and then in stock, and in the month of July, 1896, the plaintiff issued at Stratford certain small hand-bills for local distribution, advertising his business and pointing out to the public the special bargains he was offering in the various lines he was engaged in (setting out the contents of the hand-bills).

4. The defendant came to Stratford and obtained a number of such hand-bills, and mailed them to various wholesale creditors of the plaintiff, and wrote and published letters to such creditors, along with the hand-bills, of and concerning the plaintiff, and in such letters falsely and maliciously charged and alleged that the plaintiff was advertising his business and unduly forcing sales with the view of selling and disposing of his goods to defeat and defraud his said creditors.

5. To some of the said creditors the defendant merely mailed the hand-bills, with the intention and object of thereby leading, and did thereby lead, the said creditors to believe that the plaintiff was unduly sacrificing his stock with the end in view of defeating and defrauding the said creditors.

6. The plaintiff charges that the said hand-bill being perfectly innocent in itself and issued in the regular course

of business, its intention and object were entirely misrepresented by the defendant to such creditors, and the construction the defendant falsely induced such creditors to place upon it was that it was issued for the purpose of defrauding such creditors.

7. The defendant, at the city of Stratford, in the month of July, 1896, spoke and published of the plaintiff, in connection with the plaintiff's business as such merchant, falsely and maliciously, and with the intention of injuring the plaintiff in his business and causing his creditors to press for immediate payment, the words following: "He" (meaning the plaintiff) "is insolvent;" "he should not be allowed to be in business;" "he ought to be forced out of business;" "he is a rogue and is dishonest;" "he is selling his goods to defraud his creditors;" "he is shipping away goods from his store to defraud his creditors;" "he has goods concealed in his house that belong to his creditors;" "he ought to be forced to the wall;" and that he (the defendant) would force the plaintiff "to the wall" and "out of business."

8. The plaintiff, by reason of the wrongs aforesaid, has been greatly injured in his credit and business as such merchant; his creditors became alarmed and refused him further credit; some of them upon the receipt of the said hand-bills, with the representations made by the defendant, issued writs against the plaintiff, and moved for speedy judgment, and exhibited the said hand-bills received by them from the defendant as evidence of a fraudulent intent in the plaintiff; and the credit and business standing of the plaintiff was, by reason of the said wrongs of the defendant, entirely ruined, and his stock and assets seized under executions obtained upon the judgments taken in consequence of the defendant's wrongful action.

And the plaintiff claimed \$5,000 damages and costs.

The motion was argued before Mr. Cartwright, an official referee, sitting for the Master in Chambers, on the 9th February, 1897.

W. H. P. Clement, for the defendant, relied on *Odgers* on Libel and Slander, 3rd ed., pp. 553, 559.

W. M. Douglas, for the plaintiff, referred to *Flood v. Jackson*, [1895] 2 Q. B. 21, 26, 28, and *Riding v. Smith*, 1 Ex. D. 91.

Judgment was delivered on the 11th February, 1897.

MR. CARTWRIGHT.—The only material is the affidavit of the defendant's solicitor referring to the order made herein on the 19th September, 1896, and the affidavit of the plaintiff stating that at present he is unable to give any particulars of the alleged wrongful acts of the defendant.

In my opinion, the present action is not so much an action for libel as one of the nature referred to on page 28 of the judgment in *Flood v. Jackson*, [1895] 2 Q. B. 21.

After due consideration of the authorities relied on by both parties, and also of the case of *Winnett v. Appelbe*, 16 P. R. 57, and the cases therein referred to, and bearing in mind the rule laid down in the well-known case of *Stratford Gas Co. v. Gordon*, 14 P. R. 407, I do not think that the motion should prevail.

If the action is properly to be viewed as one of libel, then no doubt *Thornton v. Capstock*, 9 P. R. 535, is distinctly in the defendant's favour. But if it is to be regarded as an action on the case, "analogous to those which have been allowed for disturbing a man in his calling, or in the exercise of a right in other ways:" *Flood v. Jackson*, [1895] 2 Q. B. at p. 29: then the motion cannot succeed.

I am not without doubt on the point; but, in view of the fact that, as said by Boyd, C., in *Winnett v. Appelbe*, 16 P. R. at p. 58, "the defendant does not make affidavit that he cannot plead without this further information, or that he is ignorant of what occasion is complained of," I do not think his motion should succeed. If there was any *bona fides* in his contention, he could easily have made an affidavit such as is said above to be proper in such cases.

His doing so, and thereby submitting to cross-examination, would be strong evidence of *bona fides* on his part. His not having ventured to do this is, in my opinion, open to remark and entitled to great weight.

I therefore dismiss the motion with costs to the plaintiff in the cause in any event.

The defendant appealed from this decision, and his appeal was argued by the same counsel before MEREDITH, C. J., in Chambers, on the 22nd February, 1897.

Judgment was delivered on the 7th April, 1897.

MEREDITH, C. J.—The claim based on the allegations in the first six paragraphs is, in my opinion, an action for libel, and the defendant is entitled to have the words of the alleged libel set out in the pleading.

It was not disputed by counsel for the defendant that the pleading is defective if the cause of action be what I have said it in my opinion is, but it was argued that the plaintiff is not complaining of a libel, but that his action is one in case for disturbing him in his calling or in the exercise of a right; and *Flood v. Jackson*, [1895] 2 Q. B. 21, and *Riding v. Smith*, 1 Ex. D. 91, were referred to.

If the view of the official referee be right, the rule which he applied in this case must be applicable to every case in which an action is brought for defamatory words spoken of a man touching him in his trade or calling, and I find no warrant for any such exception or distinction in any of the cases.

Riding v. Smith illustrates the kind of case to which reference is made in *Flood v. Jackson*. The plaintiff was a trader, and he sued for words spoken imputing unchastity to his wife, who assisted him in his shop, and which had the effect of depriving him of custom. The wife was made a co-plaintiff, but at the trial her name was struck out, and Chief Baron Kelly points out (p. 93) that "as the declaration originally stood, it was necessary to shew

that the slander was actionable either in itself, or else by reason of some special damage arising from it." And he adds, "but in the course of the case it was agreed that the wife of the plaintiff should be dismissed from the action, which then remained in substance not slander, but an action by the plaintiff, a trader, carrying on business, founded on an act done by the defendant which led to loss of trade and customers by the plaintiff." The words spoken were defamatory, not of the husband, but of the wife, and not, as here, defamatory of the plaintiff himself, and there is nothing in the case to support the view that had the words spoken been defamatory of the plaintiff, the action would not have been treated as an action for defamation, but the observations of the Chief Baron to which I have referred lead to the opposite conclusion.

The statement of the cause of action in the first six paragraphs of the statement of claim is, therefore, in my opinion, insufficient.

I differ also from the official referee as to the right of the defendant to particulars under the 7th paragraph. The defendant is, I think, entitled to some particulars as to the times when and places where the defamatory words were used, and as to some of the persons in whose hearing they are alleged to have been spoken.

In *Winnett v. Appelbe*, 16 P. R. 57, which was relied upon by the referee, the statement of claim alleged that the words complained of were spoken to one Sarah Cole and others, and upon the application for particulars as to the "others," it appeared that the plaintiff was suing for words spoken on a single occasion when Sarah Cole and others whom he did not know were present, and the order for particulars was refused. Such a case is clearly distinguishable from this. Here, for all that appears, the plaintiff may be suing for words spoken on many occasions and before many different persons, and no single occasion and not one of the persons is mentioned in the pleading.

The appeal must be allowed, but the plaintiff should have leave to amend the 4th paragraph of the statement

of claim, and he must deliver particulars such as I have indicated under the 7th paragraph; but before delivering the particulars he should, I think, have leave to examine the defendant in order to enable him to furnish them.

If the plaintiff does not amend paragraph 4 within ten days, it must be struck out.

The costs of the appeal and the motion in Chambers will be costs in the cause to the defendant in any event.

ELMSLEY ET AL. V. HARRISON ET AL.

Amendment—Pleading—New Case Made at the Trial—Statute of Frauds.

In an action by a lessor against an assignee of the lease, brought after the expiry of the lease, to recover possession of the demised premises, and for cancellation of the lease, and for relief from any claim of the defendant for renewal under a covenant in that behalf, the defendant set up in his defence the covenant to renew, and alleged that he and the plaintiff had never been able to agree upon a new rent, but that he had always been ready and willing to have it fixed by arbitration, as required by the lease, and had, since action, notified the plaintiff of the appointment of an arbitrator. In reply the plaintiff alleged that the defendant had made a written offer to renew at a named rental; that the plaintiff had accepted the offer; but that the defendant had not carried out the arrangement so made. There was no further pleading. At the trial the evidence shewed a written offer made by the defendant, but only a conditional acceptance by the plaintiff, who, however, gave uncontradicted evidence of a subsequent verbal renewal by the defendant and acceptance by the plaintiff of the terms of the former written offer:—

Held, FALCONBRIDGE, J., dissenting, that by the conditional acceptance of the written offer, it was in effect refused, and had ceased to exist when the subsequent verbal agreement was made; it was not necessary for the defendant to plead the Statute of Frauds in rejoinder to the reply, as he was able to shew that his offer had been refused; and when the plaintiff was allowed at the trial to give evidence of a subsequent renewal by parol of the terms of the lapsed written offer, the defendant should have been allowed to set up the Statute of Frauds; upon which he was entitled to succeed.

Judgment of MEREDITH, C.J., reversed.

[November 2, 1896.—*Meredith*, C. J.]

[March 11, 1897.—*Divisional Court*.]

THE plaintiff Remigius Elmsley was the executor of the will of Charlotte Elmsley, a lessor of building land in the city of Toronto; the other plaintiffs were his children, the

beneficiaries under the will; the defendant Harrison was the assignee of the lessee; and the defendant Smith a mortgagee of the leasehold from the defendant Harrison. The lease had expired upwards of eight months before the commencement of this action, which was brought to recover possession of the demised premises and for cancellation of the lease and for relief from any claim on behalf of the defendants for renewal of the lease under the covenant to renew contained therein.

The defendant Harrison by his statement of defence set up the covenant to renew; alleged that at the expiration of the lease the plaintiff Remigius Elmsley requested him not to take proceedings under the lease to have the new rent determined by arbitration, as provided by the lease, but to await the result of another arbitration then pending respecting the rent of adjacent land; that he did so, but that he and the plaintiff Remigius Elmsley had never been able to agree upon a new rent, and that he, the defendant Harrison, had always been ready and willing to have it fixed by arbitration, as required by the lease, and had since action brought notified the plaintiff Remigius Elmsley of the appointment of an arbitrator on behalf of him, the defendant Harrison.

The plaintiffs replied to this, admitting the proviso for renewal, but alleging that "by an instrument dated on or about the 5th day of December, 1895, the said defendant offered to fix the renewal rental at the sum of \$6 per foot for the first eight years of the term and the sum of \$8 per foot for the succeeding thirteen years of the term, which offer the plaintiffs accepted, but the said defendant has neglected and refused to carry out such arrangement and to pay the rent that is due in respect thereof or to vacate the said premises."

The action was tried before MEREDITH, C. J., without a jury, at Toronto, on the 11th September, 1896.

The evidence, so far as it is material, is referred to in the judgment of MEREDITH, C. J.

Delamere, Q. C., for the plaintiffs.

E. D. Armour, Q. C., for the defendant Harrison.

Judgment was delivered on the 2nd November, 1896.

MEREDITH, C. J.—Charlotte Elmsley, under whom the plaintiffs claim, by indenture of lease dated 15th April, 1874, demised to John Fletcher, under whom the defendants claim, lot 27 on the west side of Yonge street in the city of Toronto, according to registered plan D3, for the term of twenty-one years.

The lease contains a covenant for renewal in the following terms :—

“ And the said lessor covenants with the said lessee that she will immediately after the expiration of the said term of twenty-one years grant to the said lessee another lease of the said hereby demised premises containing the like covenants, conditions, provisions, and agreements as are in this lease contained and expressed, and at and under a certain yearly rent payable half-yearly in advance, the amount whereof to be ascertained in manner following, that is to say, by the award and valuation of two appraisers, of whom one shall be appointed by the lessor and the other by the lessee, with power to the said appraisers to nominate a third, if they cannot agree, and the award of a majority of the said three appraisers or arbitrators shall be binding on all the parties hereto; and at the expiration of the second term of twenty-one years, the said lessor will grant another lease for a further term of twenty-one years, to commence at the expiration of the said second term, the annual rent to be ascertained and fixed in the same manner as hereinbefore provided in relation to the second term of twenty-one years.”

After the expiration of the original term of the lease, it was arranged between the parties that steps for the appointment of arbitrators to fix the rental for the term of the renewal lease should be delayed pending an arbitration as to the rental to be paid for adjacent property, which the

parties seem to have thought would furnish a guide for fixing the rental for the renewal term of the premises in question.

After the award was made on the reference referred to, the defendant Harrison made an offer in writing to the plaintiffs' representative (Mr. Elmsley) to fix the rental for the first eight years of the renewal term at \$6 per foot, and for the remaining years of it at \$8 per foot. The letter making this offer is dated 5th December, 1895. Elmsley on the 9th of the same month replied by a letter of that date, in which he in terms accepted the offer of the 5th December, but added "a suggestion or condition" as to the insurance of the property.

On the 14th December, 1895, Elmsley met the defendant Harrison, and it was then verbally agreed between them that the former should withdraw his letter of the 9th December, and should accept the offer without the condition with which he had qualified the previous acceptance of it, and that Elmsley should write the defendant Harrison another letter so accepting the offer.

In pursuance of this arrangement, Elmsley on the 18th December wrote the defendant Harrison a letter accepting the offer, adding, however, to the acceptance the words following, "with the suggestion that the property be insured, and that if a fire occurs and the property destroyed or injured, that the insurance money be devoted to rebuilding."

Shortly after this the matter was placed by Elmsley in the hands of his solicitors for the purpose of having it closed in accordance with the arrangement which had been arrived at.

The plaintiffs' solicitors prepared a draft of the renewal lease, which they sent to the defendant Harrison's solicitors for their approval. This draft contained a covenant on the part of the lessee to insure, and a provision for applying the insurance money, in the event of the destruction or injury of the buildings by fire, in rebuilding or repairing them.

The defendant Harrison's solicitors made no objection to the provisions of the draft lease, and neither said nor did anything, though the plaintiffs' solicitors pressed them to deal with the matter, and the draft lease was never returned.

The last letter written by the plaintiffs' solicitors to the defendant's solicitors is dated the 29th January, 1896, and informed them that unless the terms of the agreement for a new lease were at once completed, and all arrears of rent and taxes paid to date, proceedings to cancel the lease and get possession of the premises would be taken, and no answer being received to that communication, this action was thereupon brought on the 12th February, 1896.

In their statement of claim the plaintiffs allege the making of the lease, the assignment of the term to the defendant Harrison, and by him to the defendant Smith by way of mortgage, the devolution of the estate of the lessor on the plaintiffs; that the lease contains a covenant for the payment of the rent and taxes and a proviso for re-entry on the non-payment of rent or non-performance of covenants; that the term had expired, but that the defendant refuses to give up possession; that no rent has been paid for upwards of a year; that there is a large sum due for rent and taxes in respect of the premises; and that the lease contains a covenant for renewal for a further term of twenty-one years, which the plaintiffs were unwilling to grant under the circumstances, the same having been forfeited; and the claim is that the defendants may be ordered to deliver up possession and to pay what is due for rent and taxes, for cancellation of the lease, and that the plaintiffs may be relieved from any claim by the defendants for the renewal of the lease, and for further relief.

The defendant Harrison in his statement of defence alleges the payment of all rent and taxes up to the date of the expiration of the lease and the performance of the covenant contained in it. He also sets up the covenant for renewal, and alleges that after the expiration of the

lease the plaintiffs requested him not to appoint his arbitrator for the purpose of fixing the rent for the renewal term, and that the amount of it has not been agreed upon and is still unsettled; that since the commencement of the action, he has notified the plaintiffs of the appointment of his arbitrator, but that the plaintiffs have not nominated theirs; and he submits that the statement of claim discloses no cause of action, and claims the benefit of ch. 143 of the Revised Statutes of Ontario.

The plaintiffs replied specially to the statement of defence, admitting the provision for renewal, and alleging that the defendant Harrison, by an instrument in writing dated on or about the 5th December, 1895, offered to fix the renewal rental at \$6 per foot for the first eight years of the term and \$8 per foot for the succeeding thirteen years of it, which offer the plaintiffs accepted, but that the defendant Harrison neglected and refused and still neglects and refuses to carry out the arrangement and to pay the rent that is due in respect thereof or to vacate the premises; and in all other respects the plaintiffs joined issue upon the statement of defence of the defendant Harrison.

There was no subsequent pleading by either party, and the defendant Harrison has not by his pleading claimed the benefit of the Statute of Frauds.

If the defendant Harrison is entitled to rely on the provisions of the Statute of Frauds, the plaintiffs' case must fail, because they are setting up an agreement partly in writing and partly by parol.

No doubt, had the plaintiffs accepted unconditionally the offer of the 5th December, 1895, an agreement binding on the defendant Harrison, and sufficiently evidenced to satisfy the provisions of the Statute of Frauds, would have been shewn. The plaintiffs did not, however, accept the offer unconditionally, but made what was in effect a counter-proposition, and were not at liberty subsequently to change their minds and to accept the offer unconditionally: see *Hyde v. Wrench*, 3 Beav. 334; *Sheffield Canal Co.*

v. *Sheffield and Rotherham R. W. Co.*, 3 Railway and Canal Cases 121; *Honeyman v. Marryat*, 21 Beav. 14; *S. C.*, 6 H. L. C. 112.

There being no acceptance in writing by the defendant Harrison of the counter-proposition, the agreement could not, if he had chosen to avail himself of the benefit of the provisions of the statute, have been enforced against him.

Being of opinion, as I have found on the evidence, that there was a concluded verbal agreement between the parties that the rent for the renewal term should be fixed on the basis of the offer of the 5th December, if the Statute of Frauds be out of the way, that agreement was effectual to bind the parties.

The plaintiffs by their replication allege that such an agreement was made, and the defendant Harrison was bound, if he desired to avail himself of the provision of the Statute of Frauds, to plead the statute as a defence: see Con. Rules 402, 413; *Clarke v. Callow*, 46 L. J. N. S. Q. B. 53; *Odhams Brothers v. Brunning*, 12 Times L. R. 303; *Sales v. Lake Erie and Detroit River R. W. Co.*, 17 P. R. 224; and cases there cited.

It is true that the defendant Harrison could not without leave have filed any other pleading after the replication (Con. Rule 382); but that, I think, can make no difference. He was bound, by the combined effect of Rules 402 and 413, to raise the defence of the statute if he intended to rely on it, and all that Rule 382 effected was to prevent his doing that without obtaining leave.

I have not failed to observe that the language of the English Rules corresponding to Con. Rules 402 and 413 is not the same as that used in the Con. Rules, but the effect is, I think, the same, and the cases referred to authorities for holding as I have held.

The plaintiffs' statement of claim does not, as was pointed out by Mr. Armour, make the case which was presented at the trial, but the replication, I think, does, and, taking

them together, they make it clear that the plaintiffs rested their right to possession as well on the ground that the right to the renewal was gone by reason of the defendant Harrison's refusal to carry out the agreement for it, supplemented by the agreement alleged to have been made fixing the rent for the renewal term, as on the other grounds mentioned in the statement of claim.

Mr. Armour applied for leave to amend by setting up the Statute of Frauds as an additional defence, but I do not think that the amendment should be allowed. The rule as to pleading the Statute of Frauds is to be construed strictly, and I am, I think, fully warranted by the case of *Sales v. Lake Erie and Detroit River R. W. Co.*, already referred to, and the cases cited in it, in refusing, as I do, to allow the amendment.

The defendant Harrison has not attempted to deny that the rent was fixed by the verbal agreement of the parties, and I do not think that he should be permitted to escape from the consequences of making it unless he has placed himself in the position which the Rules require a party to take to enable him to shelter himself in repudiating his agreement behind the provisions of the Statute of Frauds.

There must, therefore, be judgment for the plaintiffs for possession and for the amount of the rent and taxes up to the time of entering judgment—the rent to be fixed on the basis of the agreement, and the amount of the rent and taxes to be ascertained by the registrar in case the parties cannot agree as to it; and the defendant Harrison must pay the costs of the action.

The defendant Harrison should, however, have an opportunity afforded him of accepting a renewal of the lease on the terms which I have found to have been agreed on, and if he elects so to do and executes the renewal lease and pays the rent and taxes and the costs of the action, judgment is not to be entered, and he is to have thirty days within which to elect and to execute the renewal lease, and to pay the rent, taxes, and costs.

The defendant Harrison appealed against this judgment, and his appeal was argued before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 9th February, 1897.

E. D. Armour, Q. C., for the appellant.

E. T. English, for the plaintiffs.

Judgment was delivered on the 11th March, 1897.

STREET, J.—With very great deference, I am unable to agree in the judgment pronounced in this case, because I am unable to find from the writings or from the evidence any concluded contract between the parties.

The position is this. On 5th December, 1895, the defendant wrote to the plaintiff offering as a renewal rent \$6 per foot for the first eight years of the lease and \$8 per foot for the remaining thirteen years. On the 9th December, 1895, the plaintiff replied to this, accepting the offer, but adding to his acceptance the following words: "I would add a suggestion and condition that the property be insured and the policy transferred to me as executor of the late C. Elmsley, on condition that the amount of insurance be devoted to the rebuilding of premises in the event of a fire occurring." This stipulation amounted to a new proposal, and the defendant refused it.

A few days afterwards, on the 14th December, the parties met, and the plaintiff's own uncontradicted account of what took place is as follows: "He told me his people, interested in it, objected to the condition of the insurance; I said, 'will you, if I take that out and write you another letter accepting it, accept it with that condition taken out? But remember I may put in a suggestion, but you are not bound by the suggestion in any way. It is optional with you whether you are to transfer the insurance to me or not.'" Further on he says: "He told me himself, that if I would take out the condition——, I said, 'well, about the suggestion?' he said, 'that just remains a matter whether we will give you the insurance or not if the place is burned down.'"

In crosse-examination the following took place :—

“ Q. In your conversation of the 14th of December did he say, ‘ I will insure ; I will accept that condition ? ’ A. He said he would not accept it.

“ Q. Then you wrote this with the suggestion that the property be insured ? A. Yes.

“ Q. When did he accept that term ? A. At that conversation.”

On the 18th December, 1895, the plaintiff wrote a letter in the following words to the defendant :

“ *Re Fletcher Lease.* Referring to our conversation of the 14th December, I beg to state that I accept your offer of \$6 per foot for the first eight years and \$8 per foot for the remaining thirteen years of the lease for twenty-one years of the Yonge street property leased by John Fletcher from the Elmsley estate, with the suggestion that the property be insured, and that if a fire occurs and the property destroyed or injured, that the insurance money be devoted to rebuilding.” No reply, either written or verbal, was made to this letter.

On 13th January, 1896, the plaintiff’s solicitors submitted to the defendant’s solicitors a draft lease, which contained a covenant on the part of the lessee to insure and to expend any money received upon the insurance policy in rebuilding ; but the draft so drawn was neither accepted nor declined, and finally this action was brought. Since action brought, as well as before, the plaintiff has offered to renew the lease “ *on the terms of the agreement arrived at* ” between the parties.

The case set up by the plaintiff in his reply is an acceptance by the plaintiff of a written offer made by the defendant. The defendant has not set up the Statute of Frauds as an answer ; and I agree that if the plaintiff has proved the case made by his pleadings, the defendant should not now be allowed to amend by setting up the statute.

The evidence does not, however, in my opinion, support the case set up by the plaintiff, for the written offer made by the defendant on 5th December was not accepted by

the plaintiff, but was, as a matter of law, refused by him, because in his letter of 9th December he accepted conditionally, and the offer must, therefore, be treated as having been refused. The plaintiff has, however, been allowed to set up and has succeeded upon a new verbal agreement said to have been reached at an interview between him and the defendant on the 14th December. In that interview it is said that the defendant agreed in effect to renew his offer of the 5th December, and the plaintiff agreed to accept it. This, however, is not the case made by the plaintiff's pleading, but is a new and parol renewal of the terms of a former written offer which had been refused and had ceased to exist. The defendant might well have omitted to plead the Statute of Frauds to the case made by the plaintiff's pleading, relying upon the ease with which he was able to shew that the plaintiff had not accepted but had refused the written offer of the 5th December which he pleads; and this should not preclude him from pleading the statute to a subsequent renewal by parol of the terms of the lapsed written offer. The case of *Odhams Brothers v. Brunning*, 12 Times L. R. 303, would no doubt support the refusal of the Chief Justice to allow the statute to be set up even under the circumstances to which I have referred. The Lords Justices in that case seem to have considered that a defendant who relies upon the defence that he has not contracted in writing is bound to say so as soon as opportunity offers, even though the contract alleged by the plaintiff is not the precise one which is proved. In the House of Lords, however, upon an appeal from this judgment, reported in 13 Times L. R. 65, since the delivery of the judgment of the Chief Justice, the Court reversed the decision of the Lords Justices, using language which is very apt here. The Lord Chancellor said that "the plaintiffs ought to have said in their statement of claim that they relied not only upon a written but also upon a parol agreement, to have given the defendant notice that he must plead the Statute of Frauds. He thought that under the pleadings the plaintiffs ought not

to have been allowed to give evidence of a fresh cause of action not disclosed in their statement of claim."

In my opinion, therefore, the defendant here should have been allowed to set up the Statute of Frauds in answer to the new case made by the plaintiffs at the trial, and, being now allowed to do so, is entitled to succeed.

I am further of opinion, however, that no agreement, either parol or otherwise, has been shewn to have been arrived at between the parties. There was no parol agreement, because the plaintiff says he was to write a letter to the defendant accepting the renewed offer of the defendant, and that this letter was to be the acceptance, and that he reserved the liberty of adding to it a suggestion with regard to the insurance. Under these circumstances, I cannot think that the contract was finally made at the interview, because the letter that was to be written was an essential part of it; and if no letter had been written, there would have been no contract. Then, in my opinion, the letter, when written by the plaintiff, is open to the same objection as an acceptance of the defendant's offer that his former offer had been. It would have been possible no doubt for the plaintiff to accept the defendant's offer absolutely, and to add to his letter a suggestion with regard to the insurance in a manner which should not qualify or invalidate the acceptance. But this the plaintiff has not done; he says in his letter, "I accept your offer * * *with the suggestion,*" etc., thus making the suggestion an integral part of the acceptance. I cannot bring myself to think that if the defendant were asking for specific performance against the plaintiff, he could treat this letter as an unqualified acceptance of his offer; nor that if he had written to the plaintiff after receiving this letter, treating the matter as completed, he could have escaped being bound by the plaintiff's suggestion as to the insurance.

For these reasons, I am of opinion that the appeal should be allowed with costs, and the action should be dismissed with costs.

ARMOUR, C. J.—I agree with my brother Street. If the plaintiff had been held to the proof of the alleged contract set out in his replication, he could not have succeeded, and he having been allowed to give evidence of an alleged contract not set out in his replication, the learned Judge was, I think, bound to allow the defendant to plead to such last mentioned contract, and to set up thereby the Statute of Frauds—this was but common justice.

FALCONBRIDGE, J.—The learned Chief Justice found, and, if I may say so without presumption, properly found, on the evidence, that there was a concluded verbal agreement between the parties that the rent for the renewal term should be fixed on the basis of the offer of the 5th December.

The plaintiffs do not in their replication base their claim on a written contract, but set up an offer by the defendant Harrison by an instrument in writing, "which offer the plaintiffs accepted," and they do not allege an acceptance in writing. In *Brunning v. Odham Brothers*, 13 Times L. R. 65 (where the House of Lords reversed the Courts of Appeal, 12 Times L. R. 195) the plaintiffs had based their claim on a written contract, to which the defendant could not have pleaded the Statute of Frauds. There has been no surprise here; the defendant has all along been perfectly conversant with the facts, which must be taken to be as Mr. Elmsley states them, the defendant Harrison not having seen fit to give evidence of what took place between them.

In *Williams v. Leonard*, 16 P. R. 544, I thought that justice required that the amendment should be made. There the evidence which proved it was in, which seems to be one of the circumstances considered by the Court of Appeal in affirming our judgment (*S. C.*, 17 P. R. 73.)

Here the amendment, if allowed, would have the effect of defeating a just claim, and I do not think it ought to be allowed, especially as I have shewn that the replication does not set up a written contract, and the defendants

might and ought to have applied at the proper time to plead the statute.

I do not think the "suggestion" about the insurance affects the matter. That was thrown out by Mr. Elmsley for the consideration of Mr. Harrison for their mutual benefit, and was not a vital or integral part of the proposition or of the contract.

True, it was inserted in the draft lease ; still, as I think, as a mere suggestion, which the defendant Harrison or his solicitors might have refused to adopt without impairing the verbal contract.

As a matter of fact, the solicitors for the defendant never did object on that ground.

I am unable to see any merits in the defence, and in my opinion the judgment of the learned Chief Justice ought to be affirmed and this appeal dismissed with costs.

CAUGHELL V. BROWER.

Security for Costs—Rule 1243—"Proceeding for the Same Cause"—Award—Motion to Set Aside—Appeal—Action—Matters not Included in Award.

The word "proceeding" in Rule 1243 means a proceeding in Court. An appeal from an order dismissing a motion to set aside an award made upon a voluntary submission is not a "proceeding for the same cause," within the meaning of Rule 1243, as an action to recover moneys in respect of certain matters included in the submission, but not dealt with by the award ; and, although the costs of such appeal are unpaid, security for costs of the action will not be ordered.

[April 9, 1897.—*Meredith*, C. J.]

AN appeal by the plaintiff from an order of the junior local Judge at St. Thomas, made under Rule 1243, staying all proceedings in this action until security for costs should be given, upon the ground that the costs of a former proceeding for the same cause remained unpaid.

Rule 1243 is as follows : "In addition to any cases in which a defendant in any action may, by any law or by

the practice of the Courts, be entitled to obtain security for costs from a plaintiff, security for costs may be granted to the defendant or applicant in any action or proceeding in which it is made to appear satisfactorily to the Court or a Judge that the plaintiff has brought a former action or proceeding for the same cause, which is pending either in Ontario or in any other country, or that he has judgment or order passed against him in such action or proceeding, with costs, and that such costs have not been paid; and such Court or Judge may thereupon make such rule or order staying proceedings until such security is given as to the Court or Judge seems meet."

The "former proceeding" relied upon by the defendant as having been brought for the same cause as this action, was an appeal by the present plaintiff to the Court of Appeal (*In re Caughell and Brower*, 24 A. R. 142) from an order of the High Court dismissing a motion to set aside an award made under a voluntary submission to arbitration by the present plaintiff and the present defendant. This action was brought to recover moneys in respect of certain matters which were included in the submission, but were not dealt with by the award.

The appeal was argued before MEREDITH, C. J., in Chambers, on the 9th April, 1897.

J. M. Glenn, for the plaintiff.

D. Armour, for the defendant.

Judgment was delivered at the close of the argument.

MEREDITH, C. J.—I think the appeal must be allowed. The word "proceeding" in Rule 1243 means a proceeding in a Court, and cannot apply to an arbitration upon a voluntary submission. It is contended, however, that the appeal was a proceeding in Court. That is true; but it was not a proceeding for the same cause as this action; the appeal was for the purpose of having the award set

aside, but this action cannot be said to be for that purpose; and I think the Rule is not applicable.

The appeal should be allowed, and the costs here and below should be costs in the cause.

MCLEAN V. MCLEAN ET AL.

Pleading—Statement of Claim—Matters Arising Pending Action—Joinder of Causes of Action—Recovery of Land—Assignment of Dower—Leave—Rule 341.

A plaintiff cannot set up in his statement of claim matters arising pending the action.

An action for assignment of dower, is an action for the recovery of land.

McCulloch v. McCulloch, 4 C. L. T. 252, followed.

Where leave is necessary under Rule 341 to join other causes of action with an action for the recovery of land, it must be obtained before the writ of summons is issued, unless under very exceptional circumstances.

[April 12, 1897.—*Falconbridge, J.*]

AN appeal by the plaintiff from an order of one of the local Judges at Sandwich striking out certain portions of the statement of claim.

The plaintiff's claim indorsed on the writ of summons was for dower out of a certain lands and for damages for detention of dower. The action was begun on the 14th January, 1897.

The statement of claim alleged:

(1) That the plaintiff was the widow of George McLean, deceased, and the mother of the defendants, and was seventy-nine years old.

(3) That George McLean in his lifetime was seized and possessed of the lands described in the indorsement.

(4) That in his lifetime George McLean conveyed to the defendant John McLean a portion of such lands, but the plaintiff did not in any way bar her dower therein.

(5) That George McLean died on the 26th April, 1895, and by his will devised to the defendant John McLean another portion of such lands, viz., his homestead farm, in

fee, but subject to the home and support of the plaintiff, and bequeathed to the plaintiff a home and support on such portion of his lands, but did not make such bequest in lieu of dower.

(6) That on the 25th December, 1896, the defendant John McLean, taking advantage of the advanced age and infirmities of the plaintiff, fraudulently procured from her the execution of a deed of release of dower in the lands conveyed by the testator in his lifetime to the defendant, ostensibly in consideration of natural love and affection and \$1, but in fact upon his representation that he would maintain her during her natural life upon the homestead farm, fraudulently concealing from her the fact that she was entitled to such maintenance under the will, and caused such deed to be registered.

(7) That on or about the 9th February, 1897, the defendant John McLean, in the absence of the plaintiff, took possession of the dwelling-house on the homestead farm and excluded the plaintiff therefrom, and, although he offered to permit her to return, did so upon the express condition that she should not have any one to reside with her in such house; and the condition being insufferable, she declined the offer. .

(8) That the only maintenance supplied to the plaintiff by the defendant John McLean consisted of some meat and flour of the value of not more than \$30, and that the defendant's son had, at her expense, taken his supper and breakfast with her, sleeping over night in the house, and absenting himself all day and not rendering her any assistance in the house-work.

(9) That it was imprudent and unsafe for the plaintiff at her advanced age to live alone; that she should have some one in the house with her to aid her in the care and work of the household, and to render timely assistance in case of sudden illness; that a place of solitary abode for her was not a home as intended by her late husband's will; that the support bequeathed to her consisted of fuel, clothing, and the moderate comforts to which she was accus-

tomed in her husband's lifetime, and not of less than the bare necessities of existence ; and that the release of her dower was without consideration and obtained by covin, deceit, and fraud.

The plaintiff claimed :

1. That the release of dower be declared null and void and the registration thereof cancelled.

2. That it be declared to be the plaintiff's right to reside at the dwelling-house on the homestead farm, with such help and attendance as her age and infirm health required, and that her support and maintenance thereon in a style suited to her condition of life and custom in her late husband's lifetime be decreed to be a lien upon the lands.

3. That her dower be set apart or commuted for a sum of money.

4. Damages for detention of dower.

5. Further and other relief.

6. Costs.

The order appealed against was made upon the application of the defendant John McLean. It was ordered thereby that paragraphs 7 and 8, and paragraph 9, with the exception of the last clause, and paragraph 2 of the prayer, should be struck out with costs to the applicant in the cause.

The appeal was argued before FALCONBRIDGE, J., in Chambers, on the 26th March, 1897.

W. H. P. Clement, for the plaintiff. The parts of the statement of claim in question do not set up a cause of action arising after the issue of the writ of summons. The events narrated happened after the commencement of the action, but the cause of action arose before. It is true that the statement of claim goes beyond the claim indorsed on the writ ; but that is not a reason for striking it out : Rule 243 ; *Hogaboom v. MacCulloch*, 17 P. R. 377 ; *McNab v. Macdonnell*, 15 P. R. 14.

F. A. Anglin, for the defendant John McLean. This is not a case of a trivial departure as in *McNab v. Macdon-*

nell, 15 P. R. 14; an entirely new cause of action is developed by the statement of claim. The recent English decisions are against allowing any departure: Snow's Annual Practice, 1895, p. 510; *Cave v. Crew*, 41 W. R. 359; *United Telephone Co. v. Tasker*, 59 L. T. N. S. 852; *Ker v. Williams*, W. N. 1886, p. 16. In the recent case of *Hogaboom v. MacCulloch*, 17 P. R. 377, the application was for leave to amend. Rule 434 permits a ground of defence or counterclaim arising after action to be set up, but there is no provision allowing a plaintiff to set up a new cause of action. No cause of action shall, unless by leave, be joined with an action for the recovery of land: Rule 341. An action for assignment of dower is an action for the recovery of land: *McCulloch v. McCulloch*, 4 C. L. T. 252.

Clement, in reply. The plaintiff's cause of action is first of all to have the release of dower set aside; the other claim follows upon that. If leave is necessary under Rule 341, it may be granted now. Paragraphs 7, 8, and 9 are at most only prolix, and should not be struck out: *Stratford Gas Co. v. Gordon*, 14 P. R. 407.

Judgment was delivered on the 12th April, 1897.

FALCONBRIDGE, J.—There seems to be no provision in the Rules allowing a plaintiff to set up in a statement of claim matters arising pending the action.

An action for assignment of dower is an action for the recovery of land: *McCulloch v. McCulloch*, 4 C. L. T. 252.

Where the leave of the Court or a Judge is necessary under Rule 341, it must be obtained before the writ is issued, unless under very exceptional circumstances.

These two elements render the decisions in *Hogaboom v. MacCulloch*, 17 P. R. 377, and *McNab v. Macdonnell*, 15 P. R. 14, inapplicable to the present case.

The order of the learned local Judge will be affirmed and the appeal dismissed; costs to be costs in the cause to the defendants in any event.

SMITH ET AL. V. MASON ET AL.

Costs—Infants—Next Friend—Costs out of Estate or Share.

The plaintiffs, infants suing by a next friend, claimed against their father and the executors of a will a forfeiture by their father of his share of the testator's estate, and that they had become entitled to it. The action was occasioned by acts which, if they occurred, were done by the legatee after the testator's death. The action was successful in the High Court, but was dismissed on appeal to the Court of Appeal :—

Held, that the costs should not be made payable out of the testator's estate, nor out of the share of the infants' father, but should be paid by the next friend, without prejudice to his claim for indemnity out of the shares of the infants whenever they should come into possession.

In general a next friend is in the same position as any other litigant, and receives or pays costs personally as between himself and the defendants.

[April 27, 1897.—*The Court of Appeal.*]

AN appeal by certain of the defendants, the executors of the will of John Smith, from the judgment of MACMAHON, J., in favour of the plaintiffs, the infant children of the defendant J. C. Smith, in an action by them for a declaration that he had forfeited his interest under the will of his father, the late John Smith, by contracting an indebtedness and transferring an insurance policy to the appellants, and that the plaintiffs were entitled to have the income of his share applied for their benefit.

The appeal was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 5th October, 1896.

Foy, Q.C., for the appellants.

Ritchie, Q.C., and *Ludwig*, for the plaintiffs.

Moss, Q.C., and *J. H. Moss*, for the defendant J. C. Smith.

Judgment was delivered on the 2nd March, 1897, allowing the appeal and dismissing the action.

The question of costs was subsequently spoken to by counsel, and judgment thereon was delivered on the 27th April, 1897.

MACLENNAN, J. A.—Question of costs.

The action is by next friend on behalf of infants claiming a forfeiture by their father of his share of the testa-

tor's estate, and that the infants have become entitled to it. The action is against the executors and the father of the infant plaintiffs, and the executors are the sole appellants. At the time of the death, the father of the infant plaintiffs was indebted to the testator in a large sum, and the object of the action is to have it declared that the executors have no right to withhold payment of the income of the legacy from the legatee, and to apply it on his debt.

The action was successful in the Court below, but has been dismissed on appeal to this Court, and the question is as to the costs. In general a next friend is in the same position as any other litigant. He receives or pays costs personally, as between himself and the defendants : *Morgan & Wurtzburg on Costs*, pp. 351-2. It is contended that in the present case the costs should come out of the estate of the testator, or at all events out of the legacy or share in question, inasmuch as the action was occasioned by uncertainty in the terms of the will, and difficulty in its construction.

I do not think we can act on that principle. It is clear that the estate of the testator ought not to be charged with the costs, for the question concerned only one of the shares, and was occasioned by acts which, if they occurred, were done by the legatee long after the testator's death. There is, therefore, no ground on which the other legatees could be charged with any part of these costs, and we ought not to order them to be paid out of the general estate. Then as to giving them out of the particular share, it is true that the provisions of the will had to be considered in the case, but that was not what occasioned the action, and the real question was the effect of alleged acts of the legatee after the testator's death. The plaintiffs chose to attack the executors, and, through them, all the other legatees ; for, if this large debt is not paid, the shares of all will be diminished proportionally, and if the costs are given out of the legacy, the effect will be to make the successful party pay them. I therefore think the next friend

must pay the costs both here and below. Of course that will not prejudice his claim for indemnity out of the share of the infant plaintiffs, whenever it comes into possession : see *Lamb v. Cleveland*, 19 S. C. R. at pp. 81 and 84 ; and *Re Fish, Bennett v. Bennett*, [1893] 2 Ch. 413, 422.

BURTON and OSLER, JJ.A., concurred.

TOOGOOD V. HINDMARSH.

Jury Notice—Striking out—Legal and Equitable Issues—Irregularity—Discretion.

Where both legal and equitable issues are raised by the pleadings, a jury notice cannot be regarded as irregular.

Baldwin v. McGuire, 15 P. R. 305, distinguished.

Where it is apparent that an action should be tried without a jury, a Judge in Chambers will strike out the jury notice as a matter of discretion.

[April 20, 1897.—Mr. Cartwright.]

[April 22, 1897.—Osler, J. A.]

MOTION by the defendant to strike out a jury notice filed and served by the plaintiff.

By her statement of claim the plaintiff alleged :—

(3) That she and the defendant were the daughters of Hiram Comfort, deceased.

(4) That by his will the defendant was appointed his sole executrix, and, subject to certain specific bequests, the whole of his real and personal estate was given to the defendant, who duly proved the will and assumed the administration of the estate.

(5) That among the specific bequests was one of \$4,000 to the plaintiff.

(6) That some of the next of kin having questioned the validity of the will, the defendant brought an action to have it established, and on the 22nd January, 1895, a judg-

ment was pronounced thereon, upon consent, establishing the will, but directing a different distribution of the estate from that provided by the will.

(7) That during the negotiations for the settlement of the action the defendant proposed to the plaintiff that if she would concur in the settlement then made with the other parties interested, and would by such settlement accept \$7,000, the defendant, who by such judgment was entitled to receive, and did receive, the bulk of the estate, would divide between herself and the plaintiff the whole of the moneys and assets of the estate which the defendant would receive, regard being had to the \$7,000 which the plaintiff was entitled to receive under the judgment.

(8) That in consideration of the defendant's promise, the plaintiff, whose concurrence was indispensable, did consent to such judgment, under which the other next of kin became entitled to receive a larger proportion of the estate than the plaintiff.

(9) That in giving such consent the plaintiff relied entirely upon the defendant's promise.

(10) That the estate in due course passed into the hands of the defendant, and she realized and converted the greater part into cash.

(11) That since the judgment the defendant had frequently expressed her readiness to carry out the agreement and confirmed and admitted it.

(12) That a few weeks before the commencement of the action (6th January, 1897) the defendant for the first time shewed a desire to repudiate the agreement, and had since refused to perform the same.

(13) That the plaintiff had performed the agreement on her part, and was entitled to have it performed by the defendant, who, having accepted the consideration, was estopped from setting up that she was not legally bound to carry out the agreement.

(14) That \$61,765.40 was now available in the hands of the defendant for division between her and the plaintiff,

who offered to bring in the \$7,000 received by her for consideration in such distribution.

(15) That the defendant had possession of various other assets of the estate, which the plaintiff was entitled to have divided.

(18) For an alternative cause of action the plaintiff alleged that on the 24th or 25th January, 1895, she wrote to the defendant complaining of the amount which she (the plaintiff) was to receive under the will as settled by the judgment, inasmuch as she was to receive only \$7,000, while other legatees were to receive much larger proportionate increase, and regretting that she had no one to represent her interests or to give her independent advice or assistance at the settlement of the judgment, and that she was entitled to set aside the settlement.

(19) That in reply to this letter, and in consideration of the plaintiff's forbearance from insisting upon her rights, the defendant wrote to the plaintiff a letter on the 28th January, 1895, and promised therein in writing that she would make up the share of the plaintiff to \$20,000 as soon as she had got in the moneys of the estate, whereupon the plaintiff rested upon the verbal agreement and the agreement contained in the letter.

The plaintiff therefore claimed :—

1. Payment of \$27,382.70, or of whatever sum the plaintiff was entitled to under the agreement.

2. An account of the moneys received by the defendant since the death of the testator and the amounts paid out by her and of the balance now in her hands available for distribution.

3. Discovery of the other assets of the estate come to the hands of the defendant.

4. An account of the dealings of the defendant with the estate.

5. A division between the plaintiff and defendant of the moneys and other assets of the estate.

- 5a. Or, in the alternative, payment of \$13,000, or of

whatever sum the plaintiff was entitled to in respect of the cause of action set forth in paragraphs 18 and 19.

By her statement of defence the defendant denied the agreement alleged by the plaintiff, and said that the only agreement was that the will should be established and that the distribution of the estate should be as provided in the judgment, and that she paid the plaintiff the \$7,000 as agreed, on the 25th March, 1895, which sum the plaintiff agreed to accept in full settlement of all claims against the defendant, and the plaintiff, upon receipt of the \$7,000, executed and delivered to the defendant a release under her hand and seal. The defendant also pleaded the Statute of Frauds. She also denied the allegations contained in paragraphs 18 and 19 of the statement of claim, and said there never was any consideration for the promise alleged to have been made in the letter of the 28th January, 1895, and she submitted that these two paragraphs did not disclose a good cause of action.

By her reply the plaintiff alleged:—

(1) That the release set up by the defendant related only to the moneys payable to the plaintiff and her children under the will and judgment, and that such release was not, and did not purport to be, a release from the liability of the defendant under the promises set forth in the statement of claim.

(2) That the defendant persuaded the plaintiff to sign the release by stating that she would fulfil the promises made by her, and the plaintiff, relying on the future fulfilment of the promises as consideration for her so doing, signed such release.

(3) That had the plaintiff not consented to sign the release, the defendant would have been unable to obtain the personal administration of the estate.

(4) That if the release were open to the construction that it was a release of more than the claims under the will and judgment, it was signed by mistake and in ignorance of the effect thereof, and the plaintiff should be relieved therefrom, and in such event the release should be

set aside or rectified so as to conform to the true intention of the parties.

(5) That at the time of the signing of the release the effect of it was represented to the plaintiff by the defendant's solicitor to be purely formal, and to be confined to matters arising under the will and judgment, and the plaintiff had no independent advice or assistance at the time of signing such release.

The motion was argued before Mr. Cartwright, an official referee, sitting for and at the request of the Master in Chambers, on the 14th April, 1897.

W. H. Blake, for the defendant.

L. G. McCarthy, for the plaintiff.

Judgment was delivered on the 20th April, 1897.

MR. CARTWRIGHT.—After consideration of the pleadings in this action, I am not able to distinguish it from the case of *Baldwin v. McGuire*, 15 P. R. 305. This case was said in *Fox v. Fox*, 17 P. R. 161, to have decided that even in a case where there were both legal and equitable issues, a jury notice could not be given. Even if the Court in the later case is to be considered as not approving of the decision in *Baldwin v. McGuire*, they would still be bound by it, and so intimate. I have referred to all the cases cited on the very full and instructive argument, and I have arrived at the conclusion that this case is clearly within the principle of *Baldwin v. McGuire*, and that the jury notice should be struck out. Costs of this motion to the defendant in any event.*

The plaintiff appealed from this decision, and her appeal was argued by the same counsel before OSLER, J. A., sitting in Chambers for and at the request of BOYD, C., on the 21st April, 1897.

*By Rule 30 (1287) the Master in Chambers (or his substitute) has no jurisdiction to strike out a jury notice except for irregularity : exception (16).

Bank of British North America v. Eddy, 9 P. R. 468 ; *Bingham v. Warner*, 10 P. R. 621 ; *Conmee v. Canadian Pacific R. W. Co.*, 12 A. R. 744 ; *Fraser v. Johnston*, 12 P. R. 113 ; *Farran v. Hunter*, *ib.* 324 ; *Baldwin v. McGuire*, 15 P. R. 305 ; *Bristol and West of England Loan Co. v. Taylor*, *ib.* 310 ; *Lauder v. Didmon*, 16 P. R. 74 ; *Fox v. Fox*, 17 P. R. 161, were referred to by counsel.

Judgment was delivered on the following day.

OSLER, J. A.—The jury notice was not irregular, there being both legal and equitable issues on the record, and the notice being regular at least as regards the legal issues. But, on looking at the whole of the pleadings, I have no doubt that the case is one proper to be tried without a jury, because the main cause of action is an equitable one—a declaration setting it up would have been demurrable in a Court of law before the Judicature Act—and the other causes of action may perhaps be regarded as in the nature of makeweights.

The case of *Baldwin v. McGuire*, 15 P. R. 305, is not now an authority for the proposition that a jury notice is irregular where there are both legal and equitable issues ; the remarks there made must be read with reference to the state of the practice in 1893, when separate non-jury sittings were held by the Judges of the Chancery Division ; and subsequent Rules have made a difference.

I, therefore, think I should affirm the referee's order, in the exercise of my discretion. The case of *Bristol and West of England Loan Co. v. Taylor*, 15 P. R. 310, does not forbid my doing so ; and since that case the power of striking out a jury notice as a matter of discretion, where it is apparent that the action should be tried without a jury, has frequently been exercised by a Judge in Chambers.

The appeal will, therefore, be dismissed ; but the costs here and below will be costs in the cause.

CROFT V. CROFT.

Judgment Debtor—Rule 928—Examination under—"Transfer" by Judgment Debtor.

A judgment debtor had made a transfer of his property, after the debt sued for was incurred, to a mortgagee of the land of his wife, which had the effect of giving a benefit to the wife by reducing the incumbrance:—*Held*, that the judgment creditor was entitled to an order under Rule 928 for the examination of the wife as a person to whom the debtor had made a "transfer" of his property; but *quære* as to the scope of the examination.

[April 3, 1897.—Mr. Cartwright.]

[April 27, 1897.—Boyd, C.]

MOTION by the plaintiff, a judgment creditor of the defendant, for an order under Rule 928 for the examination of Victoria Croft, the wife of the judgment debtor, as a person to whom the debtor had made a transfer of his property.

Rule 928 is as follows:—

Where judgment has been obtained as aforesaid, the Court or a Judge may, on the application of the party entitled to enforce the judgment, order any clerk or employee or former clerk or employee of the judgment debtor, or any person * * to whom the debtor has made a transfer of his property or effects since the date when the liability or debt which was the subject of the action in which judgment was obtained was incurred, to attend * * and to submit to be examined upon oath as to the estate and effects of the debtor, and as to the property and means he had when the debt or liability aforesaid was incurred, and as to the property or means he still has of discharging the judgment, and as to the disposal he has made of any property since contracting the debt or incurring the liability, and as to any and what debts are owing to him. The examination is to be for the purpose of discovery only, and no order is to be made on the evidence given on such examination.

By sec. 9 of an Act respecting certain duties, liabilities,

and fees of sheriffs, 56 Vict. ch. 5 (O.), it is provided as follows:—

In case a Judge of the Court out of which the execution has issued is satisfied that there is reasonable ground for supposing that any person or corporation is in possession of any property of the execution debtor exigible under the execution, such Judge may order such person or any officer of said corporation to attend and submit to examination *vivâ voce* upon oath before an examiner named in the order, touching the property and means of the execution debtor, upon payment to the officer or other person of the same witness fees as would be payable to a witness at a trial of an action

The motion was argued before Mr. Cartwright, an official referee, sitting for and at the request of the Master in Chambers, on the 1st April, 1897.

W. N. Ferguson, for the applicant.

A. B. Armstrong, contra.

Judgment was delivered on the 3rd April, 1897.

MR. CARTWRIGHT.—The facts of this case are different from those in any of the reported cases.

Here the “transfer of property or effects” is alleged to have consisted in this, that the judgment debtor used part of the salary which he received for his services to the firm of Croft, Phillips, & Winch, in payment of sums, aggregating about \$700, for interest and taxes and other charges in respect of the house owned by his wife.

Mr. Ferguson contended that the Rule, in conjunction with 56 Vict. ch. 5, sec. 9 (O.), entitles him to the order asked for; and he stated that he wished to have the examination in order to examine Mrs. Croft as to the way in which she came to be a partner in the firm of Croft & Co., instead of her husband, and to have access to the firm’s books.

Mr. Armstrong admitted the fact of the above payments

having been made as alleged, but contended that no basis was thereby laid for the order, because the payments were not of any property or effects exigible under execution, being made out of his salary as it accrued, or even, as he alleged, being made in advance. And he further argued that the plaintiff had from his examination of Mr. Winch obtained all possible information to which he was entitled, Winch being Mrs. Croft's agent in the whole matter.

The whole question, therefore, is: under the facts, which are not in dispute, is Mrs. Croft, a transferee of property or effects of the judgment debtor so as to be examinable under the Rule in question?

In the Rule there is nothing said as to the property transferred being exigible under execution, as is said in the statute 56 Vict. ch. 5. This latter seems intended to meet the case of property having been put out of his hands by a judgment debtor and intrusted to some one who is just holding it for him so as to prevent its seizure by the sheriff; and so to be in aid of the Rule.

I have perused the cases to which I was referred on the argument. *Gowans v. Barnet*, 12 P. R. 330, has laid down that the Rule, being remedial, should be construed so as to advance the remedy, so far as the fair meaning of the words will permit: *per* ARMOUR, C. J., at p. 335.

I was also referred to *Goodeve v. White*, 15 P. R. 433; but the facts there are so different from the present case that it is not of much assistance except as deciding that a *prima facie* case of a transfer of the debtor's property or effects is all that is necessary to be shewn.

I am not free from doubt whether the present case comes within the Rule or not, but, having regard to what is said by the Chancellor in giving judgment in *British Canadian Loan Co. v. Britnell*, 13 P. R. 310, I think the order ought to go.

The operation of the order is to be stayed for a week to allow the alleged transferee to appeal, if so advised.

The defendant, the judgment debtor, appealed from the order of the referee, and his appeal was argued by the

same counsel before BOYD, C., in Chambers, on the 23rd April, 1897.

Judgment was delivered on the 27th April, 1897.

BOYD, C.—I do not see my way to disturb the referee's order to examine under Rule 928. The facts are that the debtor has made a transfer of his property (since the debt sued for was incurred) to a mortgagee of the land of the wife, which has the effect of giving a direct benefit to the wife by reducing the incumbrance. This may or may not be, according to circumstances, a matter enuring to the husband's creditors under the ruling in *Jackson v. Bowman*, 14 Gr. 156, (an analogous case in some respects). I say nothing as to the scope of the examination of the wife, but I cannot say that the order to examine on some matters is not well founded.

The order is affirmed with costs against the husband, who alone appeals.

RE CLEMENT AND DIXON.

Arbitration and Award—Extending Time for Making Award—R. S. O. ch. 53, sec. 43—Voluntary Submission—Award already Made—"Good Cause."

The Court has jurisdiction under R. S. O. ch. 53, sec. 43, to enlarge the time for making an award upon voluntary submission, after the making of the award; and it is "good cause" for so enlarging that the arbitrators themselves, pursuant to their powers under the submission, did all they could to enlarge, but were unable at the time to get the original submission whereon to make the indorsement as to enlargement.

[April 29., 1897.—*Boyd*, C.]

A MOTION by Thomas Dixon to set aside an award, and a cross-motion by R. B. Clement to enlarge the time for making the award.

By agreement dated the 13th January, 1897, the parties submitted certain differences between them to the arbitra-

tion and award of William Truax and John Coates, who appointed Frank Guggisberg as third arbitrator, and the three arbitrators entered upon the arbitration soon after the submission.

The agreement provided that the award should be published on or before the 1st March, 1897, or on or before any other date to which the arbitrators, or any two of them, should, by writing signed by them indorsed on the submission, from time to time enlarge the time for making their award.

The award was made and published on the 13th March, 1897.

The time was regularly enlarged by the arbitrators till the 5th March; and before the 5th March it was enlarged by two of the arbitrators to the 31st March, but an indorsement of such enlargement was not made upon the submission until after the 5th March, because at the time the second enlargement was made, the submission was in the possession of the third arbitrator, who was absent from home.

The motion to set aside the award was made upon several grounds, but, for the purposes of the present report, it is only necessary to refer to one of them, viz., that when the award was made the jurisdiction of the arbitrators had ceased for want of a proper enlargement of the time limited for making their award according to the terms of the agreement of submission.

By sec. 43 of an Act respecting Arbitrations and References, R. S. O. ch. 53, it is provided as follows :—

The Court of which the submission * * is made a rule or order, or any Judge thereof, may, for good cause to be stated in the rule or order for enlargement, from time to time, enlarge the term for making the award, and if no other period of enlargement is stated in the consent or order for enlargement, it shall be deemed an enlargement for one month.

The motion and cross-motion were argued before BOYD, C., in Court, on the 20th April, 1897.

J. C. Hamilton, for Thomas Dixon.

Aylesworth, Q. C., and *Kilmer*, for R. B. Clement.

The following authorities, as well as some of those mentioned in the judgment, were cited on the argument: *Russell on Awards*, 7th ed., p. 148; *Leslie v. Richardson*, 6 C. B. 378; *Re Albemarle and Eastnor*, 46 U. C. R. 183; *Re Curry*, 12 P. R. 437; *Oakes v. City of Halifax*, 4 S. C. R. 640.

Judgment was delivered on the 29th April, 1897.

BOYD, C., dismissed with costs the application to set aside the award, and proceeded:—

As to the cross-application to extend the time, there is jurisdiction after the award has been made, and there is reason for granting such an order here. Section 43 of the Act R. S. O. ch. 53 applies to voluntary submissions, and upon the facts “good cause” here exists—as the arbitrators did all they could to enlarge, but were unable to get the original submission at the time whereon to make the indorsements as to enlargement: *Re Burdon*, 27 L. J. N. S. C. P. 250; *Lord v. Lee*, 9 B. & S. 269, and L. R. 3 Q. B. 404; *Re May and Harcourt*, 13 Q. B. D. 688; *Miller v. Hogg*, 2 P. R. 299; *Johnston v. Anglin*, 5 P. R. 62.

This part of the application will be without costs to either party: see *Re Warner*, L. R. 3 Eq. 261.

HUTHNANCE ET AL. V. TOWNSHIP OF RALEIGH.

Parties—Misjoinder of Plaintiffs—Rule 324—Striking out—Leave to Bring New Actions—Ante-dating Writs—Terms—Statute of Limitations.

Upon the defendants' application, in a case of misjoinder of plaintiffs, under Rule 324, the usual order is that all proceedings be stayed till election is made as to the plaintiff who shall proceed, and that the names of the others be struck out.

But there is no power to direct that the rejected plaintiffs shall be allowed to issue writs of summons for their respective causes of action against the defendants *nunc pro tunc* as of the date when the writ in the original action was issued, there being no power to alter the date of the process.

Clarke v. Smith, 2 H. & N. 753, *Nazer v. Wade*, 1 B. & S. 728, and *Doyle v. Kaufman*, 3 Q. B. D. 7, 340, followed.

Nor can a term be imposed that in the new actions the defendants be restrained from setting up the Statute of Limitations.

Smurthwaite v. Hannay, [1894] A. C. 494, 506, specially referred to.

[May 1, 1897.—*Boyd, C.*]

AN appeal by the defendants from part of an order of one of the local Judges at Chatham.

The action was brought by four farmers in the township of Raleigh, the respective owners and occupants of lands therein, against the township corporation, to recover damages for injuries to their respective lands by the overflow of a drain.

Upon the application of the defendants, the local Judge made an order that the plaintiffs should elect within one week which one of them should proceed with this action, and that upon such election the names of the three other plaintiffs should be struck out of the action, and that the writ of summons and statement of claim be amended accordingly; and in default of such election that the action should be dismissed with costs; but that the plaintiffs whose names should be struck out should be at liberty to issue writs against the defendants *nunc pro tunc* as of the date upon which the writ in this action was issued.

The appeal was from the last clause of this order, and was heard by *Boyd, C.*, in Chambers, on the 30th April, 1897.

E. D. Armour, Q. C., for the defendants. The clause complained of was introduced to save the plaintiffs from the operation of the Statute of Limitations. The four plaintiffs were improperly joined in one action: *Smurthwaite v. Hannay*, [1894] A. C. 494. By Rule 233 (1307) every writ shall bear date on the day on which it is issued. There is power under Rule 485 to extend the time for doing any act, but there is no power to order writs to be ante-dated. In the converse case of a party being added, the Statute of Limitations runs in his favour up to the time of his being added: see *Hogaboom v. MacCulloch*, 17 P. R. 377.

H. J. Scott, Q. C., for the plaintiffs. Rule 324 is the Rule that applies. The order is a matter of discretion, and made upon terms which appear just. If there is no power to ante-date the writs, a term might be imposed that the Statute of Limitations should not be set up in the new actions. It is not like introducing a new cause of action. This action might have gone on to trial upon the terms that all the plaintiffs should abide by the result as to one. Before *Smurthwaite v. Hannay*, [1894] A. C. 494, the practice required that plaintiffs should join in one action. In *Re Butterfield*, 14 P. R. 567, a very severe order was made against a solicitor who brought three actions instead of one.

Judgment was delivered on the following day.

BOYD, C.—Upon the defendants' application, in a case of non-joinder of plaintiffs, under Rule 324, the usual order is that all proceedings be stayed till election is made as to the plaintiff whose action is to go on, and that the names of the others be struck out of the writ. That was the present order, but it is now objected that the local Judge went beyond his power in directing that the rejected plaintiffs should be allowed to issue writs for their respective causes of action against the defendants *nunc pro tunc* as of the date when the writ in this action was

issued. That objection appears to be well taken : there is no power to alter the date of the process: *Clarke v. Smith*, 2 H. & N. 753 ; *Nazer v. Wade*, 1 B. & S. 728 ; *Doyle v. Kaufman*, 3 Q. B. D. 7 and 340.

It was suggested that an equivalent term might be imposed, to the effect that in the new actions the defendants should be restrained from setting up the Statute of Limitations. But I have difficulty in seeing that this term would be just, in view of what is said by the law Lords in *Smurthwaite v. Hannay*, [1894] A. C. 494. Lord Russell of Killowen, says (p. 506) : " Such joinder of plaintiffs is more than an irregularity : it is the constitution of a suit as to parties in a way not authorized by the law and the rules applicable to procedure : " and he goes on to allude to it as " an abuse of the process " of the Court.

Substantially, then, the plaintiffs commence wrongly—they are allowed to put themselves right by electing one who shall prosecute the suit—the others drop out and have no claim to any privilege in respect of the new actions they may bring. The defendants are right—they ask no favour—and cannot be put under terms of disadvantage, such as being deprived of any defence under the Statute of Limitations : see *Re Bowden*, 45 Ch. D. at p. 447 ; *Manby v. Manby*, 3 Ch. D. 101 ; *Re Greaves*, 18 Ch. D. 551.

I come to this result most reluctantly, and allow the appeal, but without costs.

RE MACAULAY, A SOLICITOR.

Solicitor—Costs—Taxation—Discretion of Local Officer—Increased Counsel Fees.

Solicitor and client taxations are distinct from party and party taxations, both as to the scope of the inquiry and as to the powers of the officer to whom the reference is made, in regard to the allowance of items. In solicitor and client taxations there is no power of intervention on the part of the taxing officer at Toronto in order to obtain an increase in amount under such items in the Tariff as 104, 145, 150, 153; but the officer charged with the reference has power to exercise the discretion recognized by the Tariff in increasing the amount chargeable for certain services ordinarily exerciseable by the officer at Toronto in party and party taxations.

[May 3, 1897.—*Divisional Court.*]

AN appeal by Hiram A. Boulton from an order of MEREDITH, C. J., in Chambers, dismissing an appeal by the appellant from the taxation by a local taxing officer at Belleville of a bill of costs rendered by the solicitor to the appellant in respect of services in the action of *Boulton v. Boulton*.

The appeal was argued before a Divisional Court composed of BOYD, C., and ROBERTSON, J., on the 3rd May, 1897.

W. J. Clark, for the appellant, contended that a local taxing officer has no power upon a solicitor and client taxation to tax such increased fees as are, under items 104, 145, 150, and 153 of Tariff A.,* in the discretion of the

	Higher Scale.	Lower Scale.
*104. Attendance on warrant or appointment of Master, Registrar, Examiner, Referee, or County Court Clerk, per hour	\$ 1 00	\$ 0 50
To be increased in the discretion of the taxing officer in Toronto, or in County Court cases the County Court Judge, to not exceeding per hour	2 00	1 00
145. When it has been satisfactorily proved that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, or compromise actions, an allowance is to be made therefor in the discretion of the taxing officer in Toronto (or Judge of County Court in County Court cases).		

taxing officer at Toronto. He referred to Rules 195, 1217; *Re Harrison*, 80 L. T. Jour. 432; *Re Geddes and Wilson*, 2 Ch. Chamb. R. 447; *Re Chapman*, 9 Q. B. D. 254; *Re Totten*, 8 P. R. 385.

C. R. W. Biggar, Q. C., for the solicitor, relied on *Re Geddes and Wilson*, 2 Ch. Chamb. R. 447; *Smith v. Harwood*, 17 P. R. 36; *Talbot v. Poole*, 15 P. R. 274; *Holmested and Langton's Judicature Act*, p. 697.

Judgment was delivered on the same day.

BOYD, C.—Solicitor and client taxations are distinct from party and party taxations, both as to the scope of the inquiry and as to the powers of the Master to whom the reference is made in regard to the allowance of items. According to the practice, there is in these taxations no power of intervention on the part of the taxing officer in Toronto, in order to obtain an increase in amount under such items of the tariff as Nos. 104, 145, 150, and 153. But it has always been understood (see *Re Robinson*, 16 P. R. at p. 426, and *Smith v. Harwood*, 17 P. R. 36), that the special referee, *i.e.* the Master who is charged with the solicitor and client reference, has power to exercise the discretion recognized by the Tariff in increasing the amount chargeable for certain services ordi-

150. Fee on argument on supporting or opposing application to the Court, or argument of demurrer, special case, or appeal	\$10 00	\$ 5 00
On higher scale and lower scale to be increased in the discretion of the taxing officer in Toronto.		
In County Court to be increased in the discretion of the Judge to.....		10 00
153. Fee with brief at trial.....	10 00	10 00
To be increased by taxing officer in his discretion to a sum not exceeding \$40 to senior counsel and \$20 to junior counsel, in actions of a special and important nature, provided that the taxing officer in Toronto shall have power to tax increased fees, but more than one counsel fee shall not be allowed in any case not of a special and important nature, nor more than two in any case * *		

narily exerciseable by the officer at Toronto in party and party taxations.

That has been done in the present case, and an appeal on it, as a matter of principle, has been disallowed by the Chief Justice of the Common Pleas. Upon this further appeal to us, we think that the well understood practice should be adhered to in solicitor and client taxations, and therefore dismiss the appeal with costs.

ROBERTSON, J., concurred.

SMITH V. BOYD ET AL.

Particulars—Application for—Close of Pleadings—Discretion.

It is only in exceptional cases that particulars are ordered after the close of the pleadings.

And where, in an action by the plaintiff against his former partner and another, for conspiracy to ruin the business of the firm, the defendant partner set up the defence that the business was ruined by the wrongful withdrawals and overdrafts of the plaintiff and by his mismanagement, negligence, fraud, and embezzlement, and certain particulars were given thereunder, as to which the defendant swore that they were given with as much detail as he could command, shewing how the business had been conducted and the shortages which had arisen, for which he alleged the plaintiff was responsible as the acting partner :—

Held, that the discretion exercised in Chambers in refusing to order further particulars, after issue joined and notice of trial given by the plaintiff, should not be interfered with.

[March 24, 1897.—*Falconbridge, J.*]

[May 4, 1897.—*Divisional Court.*]

AN appeal by the plaintiff from an order of Mr. Cartwright, an official referee, sitting for and at the request of the Master in Chambers, dismissing a motion by the plaintiff for better particulars under paragraphs 5 and 6 of the statement of defence of the defendant Cooper.

The action was brought to recover \$50,000 damages for loss alleged to have been sustained by the plaintiff in consequence of an alleged conspiracy between the defendants, whereby, as alleged, the defendants fraudulently and

secretly withdrew from the assets of the firm of Smith & Cooper, composed of the plaintiff and the defendant Cooper, certain large sums of money, which caused the embarrassment and failure of that firm, which carried on business from 1878 to 1893.

The statement of defence of the defendant Cooper was delivered on the 19th February, 1897.

Paragraphs 5 and 6 were as follows :—

5. The embarrassment of the firm was caused by a fraudulent and collusive judgment obtained at the instance of the plaintiff, and, in so far as want of funds contributed to the embarrassment of the firm, the same was caused by the wrongful withdrawals and overdrafts of the plaintiff, which amounted to a very much larger sum than the sums withdrawn by the defendant Cooper.

6. The embarrassment and failure of the firm were to a great extent caused by the mismanagement, negligence, and fraud of the plaintiff, whereby, not only was the business of the firm neglected and mismanaged, but, in addition to the moneys overdrawn by the plaintiff, large sums of money were improperly withdrawn and embezzled by the plaintiff and the office-manager of the firm, one John R. Mason, or both of them.

A demand for particulars under these paragraphs was served by the plaintiff on the 20th February, 1897, and on the 22nd February, 1897, particulars were delivered as follows :—

(a) The overdrafts of the plaintiff out of the funds and assets of the firm over and above the amount to which he was entitled under the articles of partnership amounted on the 31st December, 1878, to \$1,383.58 (and so on, giving the amount of the overdraft at the end of each year until August, 1893, when the amount overdrawn was alleged to be \$139,894.17.)

(b) The plaintiff's duty under the articles of partnership was to attend to and manage the business, except the manufacturing part thereof, but the plaintiff did not attend to the management of the business, but, on the contrary,

spent most of his time in horse-racing, gambling, and dissipation, whereby the interests of the firm suffered as alleged.

(c) An examination of the books and accounts of the firm shews that there was a shortage to the extent of not less than \$34,407.15, for which John R. Mason was responsible, but this defendant does not know whether the whole of this amount was improperly withdrawn and embezzled by Mason, or whether the plaintiff obtained some part thereof, but the plaintiff either knew of the improper withdrawal, or ought to have known, and would have known, had he properly fulfilled his duties as a partner under the articles.

Notice of motion for further particulars was given by the plaintiff on the 12th March, 1897, before which date the plaintiff had delivered a joinder of issue and notice of trial.

In support of the motion the plaintiff filed an affidavit of his solicitor stating that the plaintiff did not know what withdrawals, overdrafts, and acts of mismanagement, embezzlement, negligence, and fraud, were referred to in the particulars.

An affidavit of the defendant Cooper, filed in answer, exhibited the report of Mr. Cross, an accountant, who had examined the books and accounts of the firm, and stated that the particulars served were prepared from this report, and it was impossible for the defendant to give any further details than were therein set forth.

The appeal was argued before FALCONBRIDGE, J., in Chambers, on the 22nd March, 1897.

H. D. Gamble, for the plaintiff.

H. S. Osler, for the defendant Cooper.

Judgment was delivered on the 24th March, 1897.

FALCONBRIDGE, J.—The authorities cited abundantly support the learned referee's order.

The plaintiff was in charge of the office, and still has reasonable access to the books, and there is no reason why he should get further particulars.

Appeal dismissed ; costs in the cause to the defendant Cooper.

The plaintiff appealed from this decision, and his appeal was argued before a Divisional Court composed of BOYD, C., and ROBERTSON, J., on the 3rd May, 1897.

H. D. Gamble, for the plaintiff. The particulars served are not of any service to the plaintiff. He is entitled to particulars shewing when overdrafts were made by him as alleged ; what acts of fraud are relied on ; what money was embezzled, and when ; what acts of mismanagement were committed, and when ; all with precise dates ; in order that he may know what case he has to meet at the trial, and not be taken by surprise. The particulars sought are for that purpose, and not to enable him to plead. I refer to Rule 1326 : *Saunders v. Jones*, 7 Ch. D. 435, 447 ; *The Rory*, 7 P. D. 117 ; *Snow's Annual Practice*, 1895, pp. 480, 483 ; *Benbow v. Low*, 16 Ch. D. 93 ; *Lyon v. Tweddell*, 13 Ch. D. at p. 378 ; *Sachs v. Speilman*, 37 Ch. D. 295 ; *Harbord v. Monk*, 38 L. T. N. S. 411 ; *Appleman v. Appleman*, 12 P. R. 138 ; *Crabbe v. Hickson*, 14 P. R. 42 ; *Queen Victoria Niagara Falls Park Commissioners v. Howard*, 13 P. R. 14 ; *Kohfreitsch v. McIntyre*, 19 C. L. J. 116.

H. S. Osler, for the defendant Cooper. The object of the motion is not to obtain information, but to embarrass the defendant Cooper in his defence. The plaintiff has no difficulty about pleading, having joined issue on the defence. Mr. Justice Falconbridge held that the plaintiff was not entitled to particulars, because he knew all about the matter and had access to the books. Cooper's affidavit shews all the sources of his information, and brings before the Court a copy of Mr. Cross' report. The service of the joinder and notice of trial is a waiver of particulars.

Judgment was delivered on the following day.

BOYD, C.—As a general rule applications for particulars are to be made before the applicant has pleaded over. Particulars are ordered with reference to pleading, and are distinguished from examination for discovery, which is to get at the knowledge of the adverse litigant. The Court may, on application for particulars, direct that the motion shall stand over till after the party has pleaded, as in *Sachs v. Speilman*, 37 Ch. D. 295. Particulars are ordered primarily with a view to have the prior pleading made sufficiently distinct to enable the applicant to frame his answer thereto properly: *Augustinus v. Nerinckx*, 16 Ch. D. 13. It is only in exceptional cases that particulars are ordered after the close of the pleadings, as is pointed out by Pollock, B., in *Gourand v. Fitzgerald*, 37 W. R. 55.

Here, after the defendant responded to the demand for particulars, the plaintiff joined issue thereon, and then set the case down and gave notice of trial. After taking these steps he applies for better particulars, which has been refused by the Master, and again by Mr. Justice Falconbridge.

No case is made out on the papers or on the argument for this special indulgence. The defendant has pledged his oath to the fact that he has given with as much detail as he knows the particulars of the plaintiff's alleged wrongdoing and misconduct. He refers to the written report of the actuary Mr. Cross, shewing how the business has been conducted and the shortages which have arisen; and he says these the plaintiff is responsible for, as he was the acting partner and the office man in the concern. Beyond this he has no knowledge. Now the proof may fail at the trial, but that is not a reason for either requiring minute particulars at this stage, or for striking out the defence: *Marshall v. Inter-Oceanic Steam Yachting Co.*, 1 Times L. R. 394; *Hankinson v. Barningham*, 9 P. D. 62; *Katrine Lumber Co. v. Liverpool Ins. Co.*, 17 P. R. 318.

I see no ground for interfering with the discretionary orders of the Master and Judge in appeal, and I would affirm them with costs in the cause in any event to the respondent.

ROBERTSON, J., concurred.

BOYD V. DOMINION COLD STORAGE COMPANY.

Costs—Defendant Company in Liquidation—Liquidator Intervening—Personal Order for Costs.

After the action was at issue, an order was made by a Quebec Court directing the winding-up of the defendant company and appointing a liquidator. The plaintiff then obtained leave from that Court to proceed with this action. Afterwards the liquidator obtained an order from that Court authorizing him to intervene and defend this action in his own name as liquidator; he then applied to this Court in this action, and obtained an order that the action proceed in the name of the plaintiff against the company and the liquidator:—

Held, that the liquidator having thus intervened and made himself a party to the action, and having appeared by his counsel at the trial and contested the claim of the plaintiff, the latter, having succeeded upon his claim, was entitled to a judgment for his costs both against the company and the liquidator personally.

This Court had no authority to direct that the liquidator might reimburse himself out of the assets; that was a question for the Court in the Province of Quebec having control of the assets.

[May 5, 1897.—*Street, J.*]

THIS was an action for cancellation of a subscription made by the plaintiff for fifty shares of the capital stock of the defendant company at \$100 a share, and all action taken upon such subscription, and for a refund of the sum of \$500 paid by the plaintiff upon such shares, on the ground that the plaintiff was induced to subscribe for the shares by the misrepresentations of an agent of the company.

The action was tried before STREET, J., without a jury, on the 21st and 22nd April, 1897, and judgment was given in favour of the plaintiff for rescission of the contract to take the shares, on the ground of material misrepresentations made by the agent, and for recovery from the defendant company of the \$500 paid, with interest from the

date of payment, and with costs of action against the company, which was in liquidation.

Osler, Q. C., and *Moss*, Q. C., for the plaintiff, asked for costs against the intervening liquidator personally, referring to *Re Dominion of Canada Plumbago Co.*, 27 Ch. D. 33, 39; *Madrid Bank v. Pelly*, L. R. 7 Eq. 442; *Turquand v. Kirby*, L. R. 4 Eq. at p. 128; *Keating v. Graham*, 26 O. R. 361.

George Bell, for the defendants, cited *Ontario Forge and Bolt Co. v. Comet Cycle Co.*, 17 P. R. 156.

Judgment was delivered on the 5th May, 1897.

STREET, J.—After the action was at issue, an order was made for the winding-up of the defendant company, and William J. Common was appointed liquidator, by the Superior Court of the district of Montreal. The plaintiff then obtained leave from that Court to proceed with the action. Afterwards the liquidator obtained an order from that Court, authorizing him to intervene and defend this action in his own name as liquidator; he then applied to this Court in the present action and obtained an order that the action proceed in the name of the plaintiff, as plaintiff, against the company and William J. Common as liquidator.

The liquidator has thus intervened and made himself a party to the action, and he appeared by his counsel at the trial and contested the claim of the plaintiff.

At the trial I found that the plaintiff was entitled to the relief asked for. I reserved the form of the judgment as to costs for further consideration.

I have looked at the cases, and I think the plaintiff is entitled to a judgment for his costs both against the company and the liquidator personally.

I have no authority to direct that the liquidator may reimburse himself out of the assets; that is a question for the Court in the Province of Quebec having control of the assets.

PATTERSON ET AL. V. CENTRAL CANADA SAVINGS
AND LOAN COMPANY.

Amendment—Pleading—New Defence—Statute of Limitations.

The defendants obtained leave to amend their statement of defence by setting up the Statute of Limitations as an additional defence in an action for waste brought by the plaintiffs as owners of the remainder in fee in certain lands of which the defendants were tenants for the lives of others :—

Held, following *Williams v. Leonard*, 16 P. R. 544, 17 P. R. 73, that the Statute of Limitations being a defence permitted by law, and the real question between the parties being as to the right of the plaintiffs to recover by action the damages claimed by them, “the very right and justice of the case” demanded that the plaintiffs should not recover in this action if the statute afforded a bar to their right to do so.

Brigham v. Smith, 3 Ch. Chamb. R. 313, referred to, however, as laying down a more reasonable and just practice.

[May 5, 1897.—*Meredith*, C. J.]

THIS was an appeal by the plaintiffs from an order of Mr. Cartwright, an official referee, sitting for and at the request of the Master in Chambers, allowing the defendants to amend their statement of defence by setting up the Statute of Limitations as an additional defence. The facts are stated in the judgment.

The appeal was argued before MEREDITH, C. J., in Chambers, on the 22nd February, 1897.

N. F. Davidson, for the plaintiffs.

Masten, for the defendants.

Judgment was delivered on the 5th May, 1897.

MEREDITH, C. J.—The action is for waste, brought by the plaintiffs as owners of the remainder in fee in certain lands of which the defendants are tenants for the lives of one Patterson and his wife.

No explanation was given in the affidavit of the defendants' solicitor, which was filed in support of the motion before the referee, of the omission of the defendants to set up the defence of the statute in their statement of

defence; the affidavit, after stating the position of the action, shewing that the plaintiffs had not joined issue or replied to the statement of defence, is confined to a statement that the solicitor is advised and believes that the plaintiffs' cause of action, if any, is barred by the Statute of Limitations, and that a defence of the statute is a good defence to the action.

The statement of defence was delivered on the 25th January, 1897, and notice of the application for leave to amend was served on the 19th of February following.

The learned official referee in granting the application proceeded on the ground that he was bound by the decided cases to which reference is made in his judgment to allow the amendment.

It was argued for the appellants that no such "hard and fast" rule existed, at all events as to allowing the Statute of Limitations to be set up, and that in all cases the granting or refusing of leave to amend is a matter in the discretion of the tribunal to which the application is made, and that in this case that discretion should have been exercised against allowing the Statute of Limitations to be set up.

The rule laid down in *Williams v. Leonard*, 16 P. R. 544, 17 P. R. 73, as to the duty to allow amendments, is not quite so imperative as the official referee appears to have thought. Mr. Justice Street, in delivering the judgment of the Divisional Court, points out that the duty is not an imperative one, but that amendments may be refused where they are not conducive to the advancement of justice, or are of a technical character, and therefore not best calculated to secure the giving of judgment according to the very right and justice of the case (16 P. R. at p. 550). He also lays it down that matters of mere hardship are not to be considered as governing the question of granting or refusing an amendment.

Although I should have thought, but for that case, that an amendment for the purpose of enabling a party to get rid of the effect of one, in order to take advantage of an-

other, lapse of time against his opponent might well be refused as not being "calculated to secure the giving of judgment according to the very right and justice of the case," and "not conducive to the advancement of justice;" the *ratio decidendi*, as I understand it, of that case compels me to hold that the Statute of Limitations, being a defence permitted by law, and the real question between the parties being as to the right of the plaintiffs to recover by action the damages claimed by them, the very "right and justice of the case" demand that the plaintiffs should not recover in this action if the statute affords a bar to their right to do so.

The view of Vice-Chancellor Mowat in *Brigham v. Smith*, 3 Ch. Chamb. R. 313, commends itself to my mind as more reasonable and just than the practice as it appears now to be settled.

It is true that neither *Williams v. Leonard*, nor any of the cases referred to in it, were cases in which the Statute of Limitations was sought to be set up; but I am not able to find any satisfactory ground on which a defence founded on that statute is to be distinguished from other statutory defences—particularly a defence under some of the sections of the Statute of Frauds.

The application for leave to amend in this case was made with reasonable promptitude and before the close of the pleadings, and, although the affidavit in support of it is not very full or satisfactory, I do not think that I can say that the fair inference from this is that the defendants must have deliberately chosen not to set up the statute as a defence, in which case it is probable sufficient ground might be found for refusing the leave asked for.

It was further objected that two of the plaintiffs having been infants during part of the period for which the claim is made, and one of them being still an infant, the defence cannot avail anything against them; but it is, I think, a sufficient answer to this contention that the defendants are not bound to accept the plaintiffs' allegations as to the infancy of two of their number, and that in any case the

plaintiffs cannot be prejudiced, because they may reply setting up the disability of these plaintiffs.

I must affirm the order appealed from. The costs of the appeal will be costs in the cause to the defendants in any event.

FAWKES V. GRIFFIN ET AL.

Action—Stay of—Jurisdiction—Application of Stranger—Judicature Act, 1895, sec. 52 (9).

The jurisdiction to stay proceedings given by sec. 52 (9) of the Judicature Act, 1895, at the instance of any person, whether a party to the action or not, is only to be exercised where the action is an improper one, or where under the former practice the Court of Chancery might have enjoined its prosecution, and only where the stranger is one who seeks to intervene and can properly be added as, a party.

[May 5, 1897.—*Divisional Court.*]

AN appeal by the plaintiff in this action from an order of MEREDITH, C. J., in Chambers, affirming an order made by Mr. Cartwright, an official referee, sitting for the Master in Chambers, upon the application of Barbara Griffin, not a party to this action, staying proceedings in this action pending the determination of an action brought by her (Barbara Griffin) against the plaintiff, to enforce an award, which order was made upon the ground that the matters in question in this action were settled by the award, and if the award were valid, this action was merged in it.

The appeal was argued before BOYD, C., and ROBERTSON, J., on the 4th May, 1897.

Bradford, for the plaintiff.

W. R. Smyth, for Barbara Griffin.

Judgment was delivered on the following day.

BOYD, C.—This is an action by the plaintiff to clear the title to land of which she claims ownership, as against

clouds put upon the title by conveyances made by and to the defendants, alleged to be forged. It has been stayed at the instance of the plaintiff, one Mrs. Griffin, in another action subsequently begun to enforce an award affecting the land claimed by the plaintiff Fawkes. Mrs. Griffin is not a party to the action stayed, but her husband is, who is alleged to be the person who made or procured to be made the forged conveyance. Mrs. Griffin does not ask to be made a party to the action stayed, and would have no right to be so added, as she is not interested in the relief claimed by the plaintiff: *Moser v. Marsden*, [1892] 1 Ch. 487. Jurisdiction to stay proceedings is given by sec. 52 (9) of the Judicature Act, 1895, at the instance of any person, whether a party or not. But this jurisdiction is only to be exercised when the action is an improper one, or whenever under the former practice the Court of Chancery might have enjoined its prosecution, and when the stranger is one who seeks to intervene as a party and can properly be added as a party.

The applicant is here a stranger, plaintiff in another action on the award, and has obtained an order staying the present action till the action respecting the award has been determined. No rule of practice appears to justify this order.

True, there may be an issue raised in this case by some of the defendants setting up that the action is not to be prosecuted because of the award, but it will be time enough to deal with that when it is raised.

The order appears to be improvidently made, and should be discharged with costs to the plaintiff against the applicant.

ROBERTSON, J., concurred.

TURNER V. DREW.

Costs—Damages—Set-off—Solicitor's Lien—Rule 1205.

There can be no set-off of damages or costs between the same parties in different actions, to the prejudice of the solicitor's lien; that is the effect of Rule 1205.

The lien is simply a right to the equitable interference of the Court not to leave the solicitor unpaid for his services, and it exists if it is made to appear that the solicitor has not been paid his costs.

[May 6, 1897.—*Boyd, C.*]

THIS action was brought by Sarah Elsie Turner, daughter of William Turner, deceased, against his widow, to enforce the terms of a trust deed, and to recover \$3,000 as the plaintiff's share of the rents of certain lands of her deceased father, and for an account.

The action was tried before BOYD, C., who gave judgment on the 29th April, 1897, declaring the plaintiff equally entitled with the defendant to the income of the property in question; directing an account (if desired by the plaintiff) of arrears due to her for six years prior to the action; for payment of what might be found due by the defendant, together with the plaintiff's costs of the action, after deducting from such arrears and costs, the costs of a former action therein ordered to be paid by the present plaintiff to the present defendant; and for other relief.

Delamere, Q. C., and *Reesor*, for the defendant, asked that there should be no set-off to the prejudice of the lien of the solicitor for the defendant in the former action.

Hislop, for the plaintiff.

Judgment was delivered on the 6th May, 1897.

BOYD, C.—There can be no set-off of damages or costs between the same parties in different actions to the prejudice of the solicitor's lien. That is the express effect of Rule 1205, the original of which dates back to Hilary Term, 2 Wm. IV.: *Dunn v. West*, 10 C. B. 420. The

same practice obtains in England, though the Rule there is differently phrased : *Hassell v. Stanley*, [1896] 1 Ch. 607.

The costs asked to be set off in this case arose in a former action differently constituted from the present, though the costs are payable by the person to receive costs herein. I do not think that anything has happened to displace the solicitor's lien—which is simply a right to the equitable interference of the Court not to leave the solicitor unpaid for his services. The lien in this case exists if it is made to appear that he has not been paid his costs in the first case; and if that is so, then I cannot order any set-off in this case to his prejudice.

No costs of this application.

BELAIR V. BUCHANAN.

Security for Costs—Plaintiff out of Jurisdiction—Property in Jurisdiction.

[May 10, 1897.—Divisional Court.]

THE decision of FERGUSON, J., *ante* 413, was affirmed, on the defendant's appeal, by a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.

James Bicknell, for the appellant.

Walter Read, for the plaintiff.

HAGGERT V. TOWN OF BRAMPTON ET AL.

Costs—Taxation—Items Common to Defence and Counterclaim.

A claim and counterclaim are to be treated as separate actions, and the costs are to be taxed in accordance with that principle; but items common to both defence and counterclaim should not be taxed, either in whole or in part, to a defendant who has succeeded upon his counterclaim, but should be wholly disallowed him.

In re Brown, Ward v. Morse, 23 Ch. D. 377, followed.

Griffiths v. Patterson, 22 L. R. Ir. 656, not followed.

Summerfeldt v. Johnston, 17 P. R. 6, distinguished.

[May 10, 1897.—*Street, J.*]

AN appeal by the plaintiff from the taxation by the local officer at Brampton of the costs of the counterclaim of the defendants Blain and McMurchy.

By the judgment in this action the plaintiff recovered judgment upon his statement of claim and the defendants Blain and McMurchy recovered judgment upon their counterclaim. No costs were given to the plaintiff, but the defendants were given costs of their counterclaim.

Upon the taxation of the costs of the counterclaim before the local taxing officer at Brampton, he taxed them as if the counterclaim had been a separate action, and allowed the defendants the full amount of all the items which were common to both defence and counterclaim—*e.g.*, “attending to file and serve defence and counterclaim,” “affidavit on production” and attendances, “notice to admit” and attendance, “attending to hear judgment,” “order to produce” and attendances—amounting in the whole to some \$30.

The plaintiff appealed from this taxation, and upon his appeal an order was made by MEREDITH, C. J., in Chambers, referring the bill to Mr. Thom, one of the taxing officers at Toronto, for consideration and report.

Mr. Thom reported in favour of disallowing to the defendants items common to both defence and counterclaim, and of allowing only such items as were applicable to the counterclaim alone, following *In re Brown, Ward v. Morse*, 23 Ch. D. 377.

The plaintiff then moved in Chambers for an order disposing of the appeal in accordance with the report of Mr. Thom.

The motion was argued before STREET, J., in Chambers, on the 8th March, 1897.

Justin, for the plaintiff.

T. J. Blain, for the defendants Blain and McMurchy, objected to the principle of the re-taxation, and contended upon the authority of *Summerfeldt v. Johnston*, 17 P. R. 6, that they should have been allowed either the whole or a share of the common items.

Judgment was delivered on the 10th May, 1897.

STREET, J.—It has been over and over again laid down that a claim and a counterclaim are to be treated as separate actions, and that the costs are to be taxed in accordance with that principle: *Finska v. Brown*, 7 Times L. R. 578; *Amon v. Bobbett*, 22 Q. B. D. 543; *Shrapnel v. Laing*, 20 Q. B. D. 334; *Summerfeldt v. Johnston*, 17 P. R. 6; *Re Brown, Ward v. Morse*, 23 Ch. D. 377; *Saner v. Bilton*, 11 Ch. D. 416; *Mason v. Brentini*, 15 Ch. D. 287; *Stumore v. Campbell*, [1892] 1 Q. B. 314.

The difficulty which arises in applying the principle to the actual process of taxation arises only with regard to what are called "common items," that is, items which are fixed in amount by the tariff, and are not applicable entirely either to defence or counterclaim, but partly to one and partly to the other.

I cannot find that it has been determined by any English or Canadian Court that these items should be apportioned, although that course has been suggested by individual members of the Courts in which the principle above stated has been under consideration; and I do find that in *In re Brown, Ward v. Morse*, 23 Ch. D. 377, the English Court of Appeal, affirming the taxing Master and Mr. Justice Chitty, held that items common to both defence

and counterclaim should not be taxed either in whole or in part to a defendant who has succeeded upon his counterclaim, but should be wholly disallowed him. I cannot find that this rule has been disturbed by any subsequent decision either in England or here. The point actually decided in *Summerfeldt v. Johnston*, 17 P. R. 6, does not cover the point raised here.

In an Irish case of *Griffiths v. Patterson*, 22 L. R. Ir. 656, decided in 1888, that is to say, five years later than *In re Brown, Ward v. Morse*, the Irish Court of Appeal determined that "common items" under such circumstances should be apportioned; but the last mentioned case is not referred to either by counsel or in the judgments of the Court.

In my opinion, therefore, the question raised here is governed by the case of *In re Brown, Ward v. Morse*, 23 Ch. D. 377, and the defendants are wrong in the objections they have raised to the principle acted upon by the taxing officer in Toronto, and they should pay the costs of the appeal from the taxing officer at Brampton, of the taxation in Toronto, and of the argument before me.

FAULDS V. FAULDS ET AL.

Parties—Misjoinder of Defendants—Distinct Causes of Action.

The plaintiff's claim as against her husband, one of the defendants, was for specific performance of an ante-nuptial contract to transfer to her certain property of various kinds, and as against the several other defendants, to whom the husband had made transfers of such property, or in whose hands it was, for relief by way of declaration, cancellation, and order for payment :—

Held, that, although the plaintiff's right to each cause of action was historically connected with each of the others, that connection related only to her rights ; the rights of each set of the defendants were as distinct as they were before the events which conferred upon the plaintiff the rights which she asserted ; and such causes of action could not properly be joined in one action.

Smurthwaite v. Hannay, [1894] A. C. 494, and *Sadler v. Great Western R. W. Co.*, [1896] A. C. 450, followed.

[May 20, 1897.—*Street*, J.]

THE plaintiff, the wife of the defendant Andrew Faulds, alleged that upon the negotiation for her marriage with him he represented to her that he was the owner of certain farm lands upon which he resided, and that if she married him she would have dower in them in case she survived him ; further, that he executed an ante-nuptial settlement upon her by which he agreed to transfer to her upon their marriage certain rents then due him, certain moneys standing to his credit in the Traders' Bank, and a certain promissory note then held by him, and certain chattels, the whole to be of the value of \$1,500 ; that the marriage was duly solemnized, and that she then discovered that, after making such representation and settlement, the defendant Andrew Faulds, a few days before the marriage, had, secretly and without consideration, conveyed part of his land to the defendant Mary Ann Ferguson, and another part to the defendant Elizabeth Ferguson, and that they had executed a mortgage, without consideration, to the defendant Margaret Bird upon the said lands ; and that he had transferred the said promissory note, without consideration, to the defendant Mary Ann Ferguson ; and that he had refused to hand over to her the money in the bank or the chattels referred to in the agreement.

The plaintiff asked for specific performance of the agreement against the defendant Andrew Faulds; that the transfers of the land to the defendants Mary Ann Ferguson and Elizabeth Ferguson respectively, might be declared void as against her; that the mortgage to the defendant Margaret Bird might also be declared void as against her; that the defendants the Traders' Bank might be ordered to pay to her the money at the credit of the defendant Andrew Faulds; that the defendant John Beacham, the tenant of Andrew Faulds who owed him the rent, might be ordered to pay it to her; and that the defendant Mary Ann Ferguson might be ordered to deliver the promissory note up to her; and she asked for the costs of the action as against all the defendants, excepting the Traders' Bank.

An application was then made to the local Judge at London, on behalf of the defendants Mary Ann Ferguson, Elizabeth Ferguson, and Margaret Bird, for an order requiring the plaintiff to elect whether to proceed in the action only for the relief claimed against them, abandoning that claimed against the other defendants, or *vice versa*. A similar application was made on behalf of the defendants Faulds and Beacham.

The local Judge, being of opinion that the various causes of action set out in the statement of claim had been improperly joined in one action, ordered that the proceedings should be stayed until the plaintiff should elect upon which one she would proceed in the action.

Thereupon the plaintiff appealed to a Judge, and the appeals were argued before STREET, J., sitting in Chambers at London, on the 15th May, 1897.

Alexander Stuart, for the plaintiff.

Talbot Macbeth and *Hume Elliot*, for the defendants.

Judgment was delivered on the 20th May, 1897.

STREET, J.—The English Rules as to parties, which correspond word for word with our Rules 300, 301, and

302, and the English Rule relating to the joinder of causes of action, which corresponds with our Rule 340, have recently been interpreted by the House of Lords in the two cases of *Smurthwaite v. Hannay*, [1894] A. C. 494, and *Sadler v. Great Western Railway Co.*, [1896] A. C. 450, in which the previous decisions bearing upon the subject are dealt with. The result arrived at is very shortly put as follows: "That in the same action you cannot bring plaintiffs, and by parity of reasoning you cannot bring defendants, before the Court, where the causes of action vested in the different plaintiffs or the causes of action that exist against the different defendants are separate."

In the present action the plaintiff seeks to bring before the Court several sets of defendants, alleging a totally distinct cause of action against each. It is true that her right to each cause of action is historically connected with each of the others, but that connection relates only to the plaintiff's rights: the rights of each set of the defendants are as distinct as they were before the events which conferred upon the plaintiff the rights which she asserts.

The Rules in question have not hitherto received, in this Province, the strict construction placed upon them in the House of Lords, and a writ has rather been considered, to use the simile of Lord Justice Bowen in *Smurthwaite v. Hannay*, [1893] 2 Q. B. 412, 422, "to be like an omnibus travelling on a certain route into which any number of persons may get as passengers for the journey."

I think, however, that I am bound to follow the English decisions to which I have referred. The appeals in the present case will therefore be dismissed with costs payable forthwith after taxation.

It is to be understood, and should be so expressed, I think, in the orders of the learned local Judge appealed from, that the plaintiff is to be entitled to bring separate actions for any cause or causes of action which may be struck out of, or abandoned in, the present action.

RE HARLEY'S ESTATE.

Executors and Administrators—Bequest to Charities—Next of Kin—Advertisement for—Payment into Court—Petition for Advice.

A testator by his will directed that his executor should distribute his residuary estate amongst churches and charities, or otherwise as he might think fit. The executor advertised for heirs and next of kin of the testator without result, and then paid into Court the money representing the residue.

Upon a petition under R.S.O. ch. 110, sec. 37, for the advice of the Court as to the construction of the will and as to further advertising for next of kin, the Court refused to make any order, in the absence of any of the heirs or next of kin.

[June 1, 1897.—Osler, J.A.]

PETITION by Rebecca A. Wass, executrix of the will of William Wass, late of the town of Oakville, who was the executor of the will of John Harley, late of the township of Trafalgar, farmer, under sec. 37 of the Act respecting trustees and executors and the administration of estates, R. S. O. ch. 110, for the advice of the Court as to the construction of the will of John Harley and as to advertising for his next of kin.

The testator died on the 5th June, 1891, leaving a will dated 30th May, 1891, by which he gave to his sole executor all his real and personal estate, and directed the executor to sell the farm and convert all his other effects into money, and out of the proceeds, first, to pay all the testator's just debts and expenses, and of the residue to pay one-third to John Husband, and to distribute the remaining two-thirds, in such way and manner as he (the executor) might think fit, amongst churches and charities, or otherwise as he might think fit.

The petition and affidavit in support thereof stated that the provisions of the will had been complied with by converting the testator's real estate and effects into money, of which the real estate produced \$3,500, and the personalty, \$106.44; by paying the debts and funeral and testamentary expenses of the testator, amounting to \$1,000; and by paying one-third of the residue to John Husband, the legatee named in the will. The remaining two-thirds had

been paid into Court by the petitioner. It was further stated that inquiries had been made and advertisements published with a view of discovering the next of kin, if any, of the testator, but none had been found.

The petitioner stated that she was desirous that such steps should be taken to ascertain whether there were any next of kin as the Court should deem proper, if the Court should deem the bequest to be void for uncertainty or otherwise; that she was desirous of executing the express wishes of the testator, so far as lawful; and that she submitted the construction of the will to the Court and asked for the advice and direction of the Court in proceeding.

The prayer of the petition was that the petitioner might be allowed to make inquiries to ascertain whether the testator left any relative or next of kin surviving, or whether, owing to a failure thereof, the money was payable to the Crown; that such inquiries might be made by means of advertisements in the public newspapers of Ontario and Great Britain as the Court should deem sufficient; and that such disposition might be made of the money paid into Court as should seem proper.

The petition was heard before OSLER, J. A., sitting in Court for and at the request of BOYD, C., on the 22nd April, 1897.

Lazier, Q.C., for the petitioner.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

Judgment was delivered on the 1st June, 1897.

OSLER, J.A.—Petition by executrix for the construction of the will and direction as to advertising for next of kin of the testator John Harley.

I must refuse this petition in the absence of any of the heirs or next of kin of the testator.

I cannot give an opinion as to the right of the executrix to dispose of the residue of the estate in accordance with

the directions in the will, viz., "amongst churches and charities, or otherwise as he may see fit." It is quite possible, having regard to the date of the will, the vagueness of the language, and the nature of the estate, that the direction may prove ineffectual. Certainly, in the absence of the next of kin, it would be a dangerous experiment for the petitioner to attempt to comply with it. I see not why she needs to concern herself in the matter at all. She has paid the debts and the one legacy about which there could be no question, and some years ago she obtained an order for leave to pay the balance in her hands into Court. She paid it in accordingly, and she is, it seems to me, discharged from all further responsibility, especially as she or the former executor had advertised for heirs and next of kin of the testator without result. All she needs do is to leave the money where it is, where the next of kin will find it when they apply for it, or where the Crown may do so if it ever desires to establish a claim.

I asked for precedents, but the petitioner has been unable to refer me to any, and my own search has been equally fruitless.

I make no order.

WELSBACH INCANDESCENT GASLIGHT COMPANY V.
STANNARD.

Security for Costs—Appeal to Court of Appeal—Special Order—Judicature Act, 1895, sec. 77.

Where there was no reason to suppose that the defendants were not intending to prosecute their appeal to the Court of Appeal in good faith, where they were conforming to an injunction obtained by the plaintiffs at an early stage, and where their ability to answer for costs had not been put to the test of an execution, and the proof of their alleged inability to pay the plaintiffs' costs, in case the appeal should prove unsuccessful, rested in great measure upon statements founded upon information and belief, a special order for security for costs under sec. 77 of the Judicature Act, 1895, was refused.

[June 1, 1897.—*Moss, J.A.*]

MOTION by the plaintiffs under sec. 77 of the Judicature Act, 1895, for a special order requiring the defendant in this action, and the defendants in two other actions brought by the same plaintiffs, to give security for the plaintiffs' costs of an appeal by the defendants to the Court of Appeal from the judgment of *BOYD, C.*, in favour of the plaintiffs, the actions being for injunctions and damages in respect of a patent of invention.

The motion was heard by *MOSS, J.A.*, in Chambers, on the 29th May, 1897.

R. McKay, for the plaintiffs.

James Bicknell, for the defendants.

Judgment was delivered on the 1st June, 1897.

MOSS, J.A.—The defendants are appealing to this Court from the adverse judgment of the Chancellor pronounced at the trial.

The plaintiffs move that the appellants be ordered to give security for the costs of the appeal, basing the application upon the ground of the appellants' inability to pay the respondents' costs in case the appeal should prove unsuccessful.

In *Confederation Life Association v. Kinnear*, referred to in *McCormick v. Temperance, etc., Co.*, 17 P. R. 175, the

defendant appealed to this Court from the judgment of the trial Judge against her. The plaintiffs moved before the full Court for security for costs of the appeal, on the ground of the appellant's poverty, and the order was refused. The result of the appeal (23 A. R. 497) shews that if security had been ordered, and the appellant had been unable to comply with the order, a great hardship would have been inflicted upon her by thus compelling her to submit to what was held to be an erroneous judgment against her, in a case in which she was brought into Court to answer the respondents' demand.

Here the defendants are appealing, and there appears to be no reason for supposing that they are not intending to prosecute their appeal in good faith. The respondents obtained an injunction at an early stage of the proceedings, and this they have still, and it is being conformed to by the appellants. In their other circumstances these cases more nearly resemble *McCormick v. Temperance, etc., Co.*, than *Donnelly v. Ames*, 17 P. R. 106.*

The ability of the appellants to answer for costs has not been put to the test of an execution, and the proof of the alleged inability rests in great measure upon statements founded upon information and belief: see *McDougall v. Copestake*, 34 Sol. Jour. 347.

I refuse the application. Costs to be costs in the appeal.

*In the Court of Appeal as constituted before the retirement of HAGARTY, C.J.O., there was a division of opinion upon the question of security for costs upon appeal to that Court. In *Unger v. Sexsmith and Cline v. City of Toronto*, in which judgments were given on the 30th June, 1896, upon the appeals of the plaintiffs from orders of MACLENNAN, J. A., in Chambers, requiring security for costs, mainly on the ground of the poverty of the appellants, HAGARTY, C. J. O., and MACLENNAN, J. A., were in favour of affirming the orders, and BURTON and OSLER JJ. A., of reversing them.

DILL v. DOMINION BANK.

Discovery—Examination of Officers of Corporation—Rule 487.

In an action to recover moneys alleged to have been deposited with the defendants, a banking corporation, at a branch, the plaintiff examined for discovery as officers the persons who were respectively manager and ledger-keeper at the branch at the time the alleged deposits were made. He then sought to examine the general manager :—

Held, that the plaintiff had the right under Rule 487 to examine the general manager as an officer of the corporation, and, the regular means of procuring his attendance having been taken, there was no excuse for his non-attendance.

[June 8, 1897.—*Divisional Court.*]

AN appeal by the plaintiff from an order of ARMOUR, C. J., in Chambers, dismissing a motion by the plaintiff for an order to attach Mr. R. D. Gamble, the general manager of the defendants, or to compel him to attend for examination for discovery, he having, under the advice of counsel, declined to attend upon a subpoena and appointment for his examination as an officer of the defendants, an incorporated banking company.

The action was brought to recover moneys alleged to have been deposited by the plaintiff with the defendants at a branch office in the city of Toronto. The plaintiff first examined for discovery, as officers, the persons who were respectively the manager and ledger keeper at that branch, at the time the deposits were made, as alleged, and then sought to examine the general manager. Mr. Gamble declined to attend for examination because, as the defendants were advised, the plaintiff had already been afforded all reasonable discovery in the action by the examination of the other persons.

Rule 487 is as follows : “ Any party to an action or issue, whether plaintiff or defendant, or, in the case of a body corporate, any one who is or has been one of the officers of such body corporate, may without any special order for the purpose be orally examined before the trial touching the matters in question, in the action by any party adverse in point of interest ; and may be compelled to attend and testify in the same manner, upon the same terms, and sub-

ject to the same rules of examination, as any witness, except as hereinafter provided."

The appeal was argued before a Divisional Court composed of FERGUSON and ROBERTSON, JJ., on the 7th and 8th June, 1897.*

Shepley, Q. C., for the plaintiff, contended that he had an absolute right under the Rule to have the examination of the general manager, no limit being set as to the number of officers who could be examined; whether Mr. Gamble could afford the plaintiff any discovery or not, was the plaintiff's affair. It was not for a witness to decline to attend upon a regular appointment and subpoena. If they were improperly issued, it was for the witness or opposite party to have them set aside. Until set aside, they were presumed to be regular, and must be obeyed.

J. D. Montgomery, for the defendants and their general manager, contended that the Court had a discretion to refuse to attach or to order the examination of a party or officer, and that discretion, exercised by the Chief Justice in Chambers, should not be interfered with by the Court: *Ashworth v. Outram*, 5 Ch. D. 943; *Jarmain v. Chatterton*, 20 Ch. D. 493. The general manager of the defendants could know nothing of the matters in question except what he was told by the officials at the branch, and could afford the plaintiff no discovery.

Judgment was delivered at the close of the argument.

THE COURT held that the plaintiff had the right under Rule 487 to examine the general manager as an officer of the defendant corporation, and, the regular means of procuring his attendance having been taken, there was no excuse for his non-attendance.

The appeal was, therefore, allowed and an order made requiring the witness to attend at his own expense for examination, with costs in Chambers and this Court to be paid by the defendants.

* Moss, J.A., also sat in the Divisional Court on the first day of the argument, but was absent on account of illness on the second day.

SAMPLE ET AL. V. McLAUGHLIN ET AL.

Security for Costs—Application Against Solicitor—Action Brought Without Authority—Applicants out of the Jurisdiction.

When plaintiffs in an action repudiate the authority of the solicitor to take the proceedings, and move to set them aside, they cannot be compelled by the solicitor to give security for costs on the ground that they reside out of the jurisdiction.

Re Percy and Kelly Nickel Co., 2 Ch. D. 531, 'followed.

Where a charge of improper conduct is made against a solicitor, who is an officer of the Court, by a person out of the jurisdiction, the Court ought not to order security for costs, and thus prevent such a charge being investigated.

[May 19, 1897.—*Divisional Court.*]

THOMAS SAMPLE and Andrew Sample, two of the plaintiffs, gave notice of a motion "for an order setting aside the proceedings in this action, with costs to be paid by W. M. Sinclair, the solicitor who assumed to act for the said applicants in this action, or for an order that the names of the said applicants be struck out of the proceedings as plaintiffs, and that the said solicitor, W. M. Sinclair, do pay to the said applicants their costs of the action and of this motion, upon the ground that the said solicitor, W. M. Sinclair, was never authorized or retained by the said plaintiffs to prosecute this action, and that the same has, so far as the said applicants are concerned, been brought entirely without authority or instructions of any kind."

Mr. Sinclair, the solicitor referred to, thereupon applied for an order directing that these plaintiffs should give security for the costs of the proceedings thus initiated, upon the ground that these plaintiffs resided out of the jurisdiction and had no property within the jurisdiction. This application was refused by the Master in Chambers on the 13th March, 1896, and Mr. Sinclair then appealed to a Divisional Court, to which at that time an appeal lay from an order of the Master in Chambers.

The appeal, after several adjournments, was heard on the 11th May, 1897, before a Divisional Court composed of ARMOUR, C.J., and FALCONBRIDGE and STREET, JJ.

W. M. Douglas, for the appellant, referred to *Apollinaris Co. v. Wilson*, 31 Ch. D. 632; *Re Miller's Patent*, 70 L. T. N. S. 270; *Vavas seur v. Krupp*, 9 Ch. D. 351; *Sykes v. Sacerdoti*, 15 Q. B. D. 423; *Belmonte v. Aynard*, 4 C.P.D. 221; *Crozat v. Brogden*, [1894] 2 Q. B. 30; *Pray v. Edie*, 1 T. R. 267; *Fitzgerald v. Whitmore*, *ib.* 362; *Selby v. Alston*, *ib.* 491; *In re Pasmore*, 1 Beav. 94; *Walker v. Niles*, 3 Ch. Chamb. R. 108; Archbold's C. L. Practice, 14th ed., vol. 1, p. 106; *Re Parker*, 16 P. R. 392.

Aylesworth, Q.C., for the respondents, cited *Cochrane v. Fearon*, 18 Jur. 568; *Re Percy and Kelly Nickel Co.*, 2 Ch. D. 531; and *Palmer v. Lovett*, 14 P. R. 415.

On the 19th May, 1897, the judgment of the Court was delivered by

ARMOUR, C. J.—I think that the order of the learned Master is right, and should be affirmed.

This action was brought in the name of Thomas Sample and Andrew Sample and others; and these parties, Thomas Sample and Andrew Sample, are now moving to set aside the proceedings, so far as they are concerned, with costs to be paid by the solicitor, on the ground that the use by the solicitor of their names was wholly unauthorized.

Under these circumstances, the solicitor is not entitled to require them to give security for costs. He has brought them into Court by the use of their names, and they are entitled to come into Court to defend themselves against such a use of their names, without being required to give security for costs, upon the principle laid down in *Re Percy and Kelly Nickel Co.*, 2 Ch. D. 531.

I am of the opinion, also, that where a charge of improper conduct is made against a solicitor, who is an officer of the Court, by a person out of the jurisdiction, the Court ought not to order security for costs, and thus prevent such a charge being investigated.

The appeal will therefore be dismissed with costs.

FOX ET AL. V. SLEEMAN ET AL.

Discovery—Documents—Photographs—Privilege—Rule 507.

In an action by certain persons, claiming to be the next of kin of a testator, the beneficiary under the will having predeceased him, against the administratrix with the will annexed, for administration of the estate, the defendant denied that the plaintiffs were the next of kin of the testator, and alleged that he had no relatives. By her affidavit of documents she stated that she had in her possession, in her personal capacity, but not as administratrix, certain photographs of the testator, which she objected to produce. The plaintiffs sought production with a view of establishing the identity of a relative of theirs with the testator :—

Held, that the photographs in question were “documents” within the meaning of Rule 507, and were not privileged nor protected, and therefore must be produced.

[June 5, 1897.—*Divisional Court.*]

AN appeal by the plaintiffs from an order of ROBERTSON, J., in Chambers, setting aside an order of the local Master at Guelph whereby the defendant Sarah Sleeman was required to make production of certain photographs referred to in the sixth paragraph of her supplemental affidavit on production of documents, and requiring her to deposit them with the local registrar, for the usual purposes.

The action was brought by the plaintiffs, claiming to be the heirs-at-law and next of kin of the late William Underhill, deceased, against Sarah Sleeman, as administratrix with the will annexed of his estate, and against the Attorney-General for the Province of Ontario, for administration of such estate.

The defendant Sarah Sleeman in her statement of defence denied that the plaintiffs were the heirs-at-law and next of kin of the testator, and further said that he had no relatives.

The photographs in question were photographs of the testator, and were of importance in relation to evidence which the plaintiffs proposed to give upon foreign commission in England to establish the identity of the testator with a relative of theirs who had many years before left England for Canada.

The testator was an Englishman, who had lived a long time in Ontario, where he had no known relatives. The will referred to gave all his estate to his wife, who, however, predeceased him. The defendant Sarah Sleeman was a niece of his wife, and letters of administration with the will annexed were granted to her.

In the affidavit on production of documents already referred to, the defendant Sarah Sleeman stated that in her personal capacity, but not as administratrix, she had in her possession the photographs in question, and she objected to produce them because they were not in her possession as administratrix, and on the further ground that they related solely to the defendants' case.

The appeal was argued before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 13th May, 1897.

W. M. Douglas, for the plaintiffs.

Aylesworth, Q. C., for the defendants.

Pindar v. Smith, 6 Madd. 48, and *Wagner v. Mason*, 6 P. R. 187, were referred to in regard to the contention that the photographs were privileged because held by the defendant Sleeman in a different character from that in which she was sued; and Rules 497, 507, 1135, and Wharton's Law of Evidence, 3rd ed., sec. 614, and *London and Yorkshire Bank v. Cooper*, 15 Q. B. D. 7, 473, were referred to upon the contention that photographs were not "documents."

Rule 507 is as follows: "It shall be lawful for the Court or a Judge at any time pending any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power relating to any matter in question in such action or proceeding, as the Court or Judge thinks right; and the Court may deal with such documents, when produced, in such manner as appears just."

Judgment was delivered on the 5th June, 1897.

ARMOUR, C. J.—In my opinion, this appeal should be allowed. The word “documents” used in Rule 507 is a word of a very comprehensive signification, and, having regard to the object of the Rule, we ought not to strive to narrow its signification, but rather to extend it.

“‘Document’ means any substance having any matter expressed or described upon it by marks capable of being read:” Stephen’s Digest of the Law of Evidence, 4th ed., Art. I.

“The remaining instruments of evidence are documents, under which term are properly included all material substances on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol. Thus the wooden scores on which bakers, milkmen, etc., indicate, by notches, the number of loaves of bread or quarts of milk supplied to their customers; the old exchequer tallies, and such like,—are documents as much as the most elaborate deeds:” Best on Evidence, 8th ed., sec. 215.

“A ‘document,’ in the sense in which the term is used in this treatise, is an instrument on which is recorded, by means of letters, figures, or marks, matter which may be evidentially used. In this sense the term document applies to writings; to words printed, lithographed, or photographed; to seals, plates, or stones on which inscriptions are cut or engraved; to photographs and pictures; to maps and plans:” Wharton on Evidence, 3rd ed., sec. 614.

In an earlier edition of his Digest of the Law of Evidence, Sir J. F. Stephen defined document as follows: “‘Document’ means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of these means, intended to be used, or which may be used, for the purpose of recording that matter.”

This definition was criticized by a reviewer in the Solicitors’ Journal of 2nd September, 1876, vol. 20, at p. 858, and the following suggested as a substitute for it: “‘Document’ means any substance having any matter

expressed or described upon it by means of letters, or figures, or marks, or by more than one of those means."

These definitions, in my opinion, warrant our holding that the photographs in question are documents within the meaning of the Rule.

These photographs are within the power of the defendant Sleeman, and are not privileged nor protected, and must therefore be produced by her.

The appeal will therefore be allowed with costs here and below.

FALCONBRIDGE, J.—I concur.

STREET, J.—I agree in the conclusion at which the Chief Justice has arrived, that the photographs in question are "documents" within the meaning of our Rules.

In addition to the authorities referred to in his judgment, I find that in *Lyell v. Kennedy*, 50 L. T. N. S. 730, the defendant in his affidavit of documents set forth certain "photographs of tombstones and houses," and sought to protect them, not, it is true, upon the ground that they were not "documents," but upon other grounds which were overruled; it does not appear to have been even suggested by counsel in the elaborate argument of the case before the Court of Appeal, that these were not "documents."

Family portraits shewn to have been treated and recognized as such are admitted as evidence in pedigree cases as equivalent to declarations by members of the family by whom they were so treated: *Taylor on Evidence*, Am. ed. of 1897, sec. 652.

It appears to me that the definitions quoted by the Chief Justice are wide enough to cover these photographs, and that they must be produced.

LAKE OF THE WOODS MILLING CO. v. APPS.

Summary Judgment—Rule 744—Application of—Special Ground for Relief—Fraudulent Preference.

An unopposed application for summary judgment under Rule 744, made the day after service of the writ of summons, in an action against a trader upon a bill of exchange, was refused. It was sworn, among other things, that the defendant had fraudulently transferred his business and property to certain persons; but the Court considered that the plaintiffs would not be prejudiced by the action being allowed to proceed in the ordinary way.

Leslie v. Poulton, 15 P. R. 332, and *Molsons Bank v. Cooper*, 16 P. R. 195, applied and followed.

[May 13, 1897.—*Meredith*, C.J.]

MOTION by the plaintiffs for summary judgment under Rule 744.

The writ of summons was issued on the 11th May, 1897, and was served upon the defendant on the 12th May, together with notice of motion for judgment returnable on the 13th May. The writ was indorsed with particulars of the plaintiffs' claim, which was to recover \$462.98 upon a bill of exchange accepted by the defendant. In support of the motion the plaintiffs filed an affidavit of one Hutchison, a salesman and traveller in their employment, verifying the cause of action, and stating that the defendant was also indebted to the plaintiffs in the amount of another bill of exchange, not yet due, for the sum of \$461.25; that the plaintiffs held no security; that the defendant carried on business as a flour merchant and miller, and in the course of such business incurred the indebtedness to the plaintiffs; that the defendant did not dispute his indebtedness; that the defendant was largely indebted to several persons; that the defendant had sold and transferred his business to the William Apps Company; that the defendant had recently paid to his mother and brother about \$2,800, which the deponent believed must have been taken out of the business; that the defendant was insolvent at the time of the transfer of the business and the payments to his mother and brother; that the deponent believed such transfer and payments to

be fraudulent and made for the purpose of defeating the creditors of the defendant; and that the defendant had no property besides the business and moneys so transferred and paid, except an equity of redemption of doubtful value.

The motion was heard by MÉRÉDITH, C. J., in Court, on the 13th May, 1897.

Arnoldi, Q.C., for the plaintiffs.

No one appeared for the defendant.

Judgment was delivered on the same day.

MÉRÉDITH, C. J.—Motion for summary judgment under Con. Rule 744, in an action begun on the 11th instant.

I am bound, I think, by the cases of *Leslie v. Poulton*, 15 P. R. 332, and *Molsons Bank v. Cooper*, 16 P. R. 195, to refuse the motion.

If the plaintiffs are in a position successfully to impeach the transfer of the defendant's property which has been made, they can bring their action for that purpose, and, if entitled to an injunction, can obtain one to restrain the alleged fraudulent transferees from dealing with the property, and they can follow the proceeds of it which may have been realized by the transferees, by any sale or disposition by them of any part of it; and in such a proceeding the transferees would have the opportunity of being heard, which they have not on the present application; and therefore it is not shewn, I think, that the plaintiffs will be prejudiced by the action being allowed to proceed in the ordinary way.

The motion is refused.*

*This decision was followed by FALCONBRIDGE, J., on the 15th June, 1897, upon a similar application in the case of *Collins v. Graham*.

RE BENNETT INFANTS.

Infants—Sale of Land—R. S. O. ch. 137, sec. 3—Dispensing with Examination.

An order was made under R. S. O. ch. 137, sec. 3, for a sale of infants' lands at a named price, such of the infants as were over fourteen having been examined before a referee and having given their consent, and the remaining infant, who was under fourteen, having been produced before the referee, who certified with regard to her in the manner directed by the Rules, but the sale was not carried out.

A subsequent offer for the lands at a lower price having been received, an order was made for a sale at that price, the circumstances being such as to shew that it was in the interest of the infants; and their further examination was dispensed with, upon its being shewn that they were out of the Province, and that they were satisfied to accept the price offered.

[June 14, 1897.—Moss, J. A.]

AN application made on behalf of the infants by their father and guardian for an order for the sale of certain lands of the infants, and dispensing with their examination, under the circumstances set forth in the judgment.

The application was made before MOSS, J. A., sitting in Chambers for and at the request of BOYD, C., on the 11th June, 1897.

Swabey, for the applicants.

F. W. Harcourt, for the official guardian.

R. S. O. ch. 137, secs. 3 and 4, and Rules 992 *et seq.*, were referred to, as well as the cases mentioned below.

Judgment was delivered on the 14th June, 1897.

Moss, J. A.—The petition in this matter, as originally presented, besides setting forth the circumstances rendering it advisable that the property in question should be sold, set forth an offer to purchase it for the sum of \$750 made by one Henderson.

The three infants who are over fourteen years of age were examined before Mr. Cartwright upon the matters of the petition, and they gave their consent thereto.

The other infant, who is under fourteen, was produced before Mr. Cartwright, and he certified with regard to her in the manner directed by the Rules.

The prayer of the petition was, as I am informed, granted, but, owing to the inability of Henderson to carry out his purchase, the sale to him fell through.

The father and guardian of the infants has now received another offer from one Reddick for the purchase of the premises for the sum of \$600, and, in continuance of the former proceedings, an application is now made for an order sanctioning a sale to him at the sum offered.

The infants are now in England, and it is sworn by their father and guardian that he is at present unable to bring them back to this Province.

It is shewn that the premises are deteriorating for want of expenditure to keep them in repair, and that there are no funds which can be made available for that purpose, even if it were advisable in the interest of the infants to make such expenditure; and that the price now offered is fair and reasonable, and one that ought to be accepted in the interest of the infants.

The official guardian has communicated with the infants, and has received a letter signed by them all, in which they state that they know of Reddick's offer, and that they are quite satisfied that it should be accepted, if their father thinks it is in their interest.

It is asked that, under the circumstances, any further examination of the infants should be dispensed with, and reference is made to *Re Lane*, 9 P. R. 251; *Re Harding*, 13 P. R. 112; and *Re Delanty*, *ib.* 143.

In view of these decisions, I think I may do what is asked in this case. The infants who are subject to examination have been examined with regard to a sale of these premises, and have given their consent. I do not think more is required than that the infants should give their consent to a sale of the property.

It is not necessary to the obtaining of an order for sale under the statute that an offer to purchase the premises shall have been first procured.

Upon the facts rendering a sale necessary, and the consent of the infants, or of such of them as are required to consent to a sale being shewn, the Court sees that a proper sale is made and carried out.

The circumstances which made it proper to sell when the petition was first presented still exist, and it is now probably more desirable that the premises should be sold without delay, than it was when the infants gave their consent to a sale.

The evidence in support of a sale at the price now offered makes it proper to sanction it.

The order may therefore go dispensing with the further examination of the infants and for the sale of the premises to Reddick for the sum of \$600 with the usual directions.

DRYDEN V. SMITH.

Discovery—Affidavit of Documents—Cross-examination—Examination on Pending Motion—Appointment—Residence of Party.

Where a plaintiff is so situated that he may for some purposes be deemed to have more than one residence within the jurisdiction and in the writ of summons he designates one of these places as the place where he resides, that place is to be considered his place of residence for the purposes of the action; and an appointment for his examination in another county is irregular.

Rule 512, providing that the deponent in every affidavit on production shall be subject to cross-examination, having been rescinded by Rule 1337, it is not competent for a party to obtain, in effect, a cross-examination of such a deponent upon his affidavit by the indirect means of examining him under Rule 578 for the purpose of using his evidence upon a motion for a better affidavit.

[June 5, 1897.—Mr. Cartwright.]

[June 21, 1897.—Moss, J. A.]

MOTION by the plaintiff in an action for slander to set aside a subpœna and appointment issued by the defendant for the examination of the plaintiff as a witness for the purpose of using his evidence upon a pending motion made by the defendant for a better affidavit on production of documents from the plaintiff.

The grounds of the motion were : (1) that the defendant should not be allowed by an indirect means to obtain, in effect, a cross-examination of the plaintiff upon his affidavit of documents ; and (2) that the appointment, being for the examination of the plaintiff at Toronto, was irregular, because he resided in the county of Ontario, although, being Minister of Agriculture for Ontario, he was in Toronto during a part of each week.

Rule 512, which provided that "the deponent in every affidavit on production shall be subject to cross-examination," was rescinded by Rule 1337, which came into force on the 1st September, 1894.

Rule 578 :—"A party to any action or proceeding may, by a writ of subpoena, * * require the attendance of a witness to be examined before the Court, or before any officer having jurisdiction in the county where the witness resides for the purpose of using his evidence upon any motion, petition, or other proceeding before the Court, or any Judge or judicial officer in Chambers."

The motion was argued before Mr. Cartwright, an official referee, sitting for and at the request of the Master in Chambers, on the 4th June, 1897.

C. J. Holman, for the plaintiff.

R. McKay, for the defendant.

Judgment was delivered on the following day.

MR. CARTWRIGHT.—Mr. McKay contended that Rule 512 having been rescinded by Rule 1337, he was now able to avail himself of Rule 578, and of the practice thereunder before the passing of Rule 512. Mr. Holman strenuously argued that such a course was absolutely unheard of, and was an entirely new experiment, and was virtually an attempt to revive Rule 512 by an indirect method.

It was not denied by Mr. McKay that in such a case as the present the defendant could not examine the opposite party generally, but he contended that he could properly

be asked specific questions, as is proposed to be done in the present case, and that this was the difference between the pending examination and a cross-examination under Rule 512. In view of the fact that this is the first time that this question has arisen, I have endeavoured to give it careful consideration, which has led me to the conclusion that the plaintiff's motion must prevail. I cannot see that this is anything else on the part of the defendant than an attempt to cross-examine the plaintiff on his affidavit on production, though perhaps he may limit it to certain matters.

This seems to me to be contrary to the intention of the Rules, as shewn by the rescission of Rule 512, and I do not think that a matter should be allowed to be done indirectly, which it is declared, after trial of Rule 512, shall no longer be done directly.

The plaintiff's motion also took the objection that the plaintiff was sought to be examined at Toronto, and not at the county town of his residence. There is no doubt that the plaintiff is frequently in Toronto, but his residence here is for the purposes of the public business only, and it is not likely that the papers he is directed to produce on this examination would be kept by him at Toronto. No doubt, as was said both in *Cartwright v. Hinds*, 3 O. R. 384, and in *Ex p. Breull*, 16 Ch. D. 484, "a man may have several residences." And the true construction of such Rules as 490 is properly to be found in the judgment in that case of Lush, L. J.

If my opinion on the first point is correct, it would not be necessary to give any opinion as to this question of residence; and I do not feel altogether clear as to the proper decision in the present instance. It is just a case in which it would be specially proper and desirable that some arrangement should be made between the solicitors as to the time and place. This should certainly be done whenever the plaintiff is going to be examined for discovery. When that takes place, I think, as a matter of strict right, the plaintiff is entitled to have it at

Whitby; and I would further observe that on that examination the defendant will be able to ask the plaintiff all the questions which he is now seeking to ask. And this is another reason for not allowing the present experiment.

In my opinion, the motion must succeed with costs to the plaintiff in the cause in any event.

The defendant appealed from the order of the referee, and his appeal was argued by the same counsel before Moss, J. A., sitting in Chambers for and at the request of BOYD, C., on the 11th June, 1897.

Judgment was delivered on the 21st June, 1897.

Moss, J. A.—A party to an action is subject to be required to attend as a witness to be examined for the purpose of using his evidence upon a pending motion, pursuant to Rule 578 : *Clark v. Campbell*, 15 P. R. 338. But he can only be required to attend for such purpose before the Court or before an officer having jurisdiction in the county where he resides.

The plaintiff's home, where his family resides, is at the village of Brooklin, in the county of Ontario, and in the writ of summons issued in this action that place is stated to be the place where he resides.

It is shewn, however, that the plaintiff is the Minister of Agriculture for the Province of Ontario, and that in the performance of his public duties he spends a large portion of his time—usually from some time on Monday until Saturday morning in each week—in the city of Toronto. Mr. McKay forcibly urged that under these circumstances the plaintiff should be deemed to reside in Toronto for the purpose of Rule 578, and that if an appointment was taken from an officer having jurisdiction in the county of Ontario, the plaintiff could properly object to attend upon it, or might set it aside on the ground of want of jurisdiction.

I think that where a party plaintiff is so situated that he

may for some purposes be deemed to have more than one residence within the jurisdiction, and on the writ of summons he designates one of these places as the place where he resides, that place should be considered his place of residence for the purposes of the action; it certainly would not be open to him to object to the jurisdiction of an officer of the county in which he has so laid his residence.

I think it is open to the plaintiff in this case to object to an appointment issued under Rule 578, unless it is for examination before the Court or an officer having jurisdiction in the county of Ontario.

This is sufficient to dispose of the appeal, but I am disposed to agree with the referee on the other branch of the case. In view of the repeal of Rule 512, I am not in favour of sanctioning the adoption of what must, at all events, be regarded as an unusual method of obtaining further discovery as to documents in the possession of a party to an action. The usual practice of examining the plaintiff for discovery has not as yet been adopted in this case, but a notice is served of a motion to be made to compel the plaintiff to file a further and better affidavit on production, producing all or any correspondence between the plaintiff and certain named persons, and between the plaintiff and any other party or parties, in regard to the appointment to the office of registrar of deeds at Whitby, and any telegrams to and from such parties, and that, in default of the plaintiff so furnishing a further and better affidavit on production, the statement of claim be struck out and the action dismissed.

In support of this motion it is proposed to read the pleadings and proceedings in the action and the examination of the plaintiff to be taken as a witness on the motion.

At present there is nothing in the pleadings or proceedings in the action to give any colour to the suggestion made in the notice of motion that there is in existence, or in the plaintiff's possession, custody, power, or control, such correspondence or telegrams, and it is admitted that the motion must fail unless something in support of it be extracted

from the plaintiff upon the proposed examination. This appears to me to be in substance an attempt to cross-examine the plaintiff upon his affidavit on production, under cover of a motion which, if made at all, should follow and be based upon the outcome of the means usually adopted under the Rules and practice for obtaining from a party information and discovery as to documents in his possession or power beyond that already furnished by the affidavit on production.

The referee's order is affirmed with costs to the plaintiff in any event.

DRYDEN V. SMITH. (No. 2.)

Pleading—Defamation—Defences—Fair Comment—Privilege—Mitigation of Damages—Confusion—Embarrassment.

The plaintiff should not be driven to spell out the defences set up in an action. He is entitled to have them set forth in such manner as will enable him, upon reading them, to form a fairly correct judgment as to their scope and meaning, and as to what is intended to be relied upon under them. And while the defendant in an action of defamation ought not to be shut out from setting up any matter which he may properly plead either in bar or by way of mitigation of damages, he should so arrange the paragraphs of his statement of defence as to group the separate defences of privilege and fair comment and the matters alleged in mitigation under their appropriate heads.

[June 1, 1897.—*Mr. Cartwright.*]

[June 21, 1897.—*Moss, J. A.*]

MOTION by the plaintiff to strike out paragraphs 5, 6, 7, and 8 of the statement of defence in an action of slander.

The statement of claim alleged :

1. That the plaintiff was Minister of Agriculture for the Province of Ontario, and member of the Legislative Assembly for the south riding of the county of Ontario.

3. That the office of registrar of deeds for the county of Ontario, was held by Dr. Rae, who died in 1896, and the office then became vacant.

4. That the appointment to the vacant office was within the gift of the Government of Ontario, of which the plaintiff was a member, and the recommendation of a person to fill such office rested usually with the member for the riding.

5. That on the 27th February, 1897, at the town hall in the town of Whitby, in the county of Ontario, to many persons there assembled, the defendant, falsely and maliciously, spoke and published of the plaintiff in relation to his offices and positions as a member of the Executive Council of the Province, Minister of Agriculture, and member of the Legislative Assembly, the words following (setting them out). The effect of the words was that the plaintiff had sold the office of registrar to the highest bidder, and the innuendo that he had been guilty of corruption and malversation in his offices and positions.

Statement of defence :—

2. The defendant admits the statements contained in the first and second paragraphs of the statement of claim, except the imputation of slander.

3. The defendant admits that Dr. Rae held the office of registrar until his death, on the 8th May, 1896, and that the appointment of a person to fill the office, was within the gift of the Government of Ontario, of which the plaintiff was a member.

4. The defendant denies the imputation of slander in the fifth paragraph, and all the other allegations contained in all the other paragraphs of the statement of claim, and puts the plaintiff to the proof thereof.

5. (a) In 1892 the defendant was elected a member to represent the south riding of Ontario in the House of Commons of Canada, and continued to sit as such member until the dissolution of Parliament in the month of April, 1896.

(b) That about the time the registry office became vacant, the general elections for the House of Commons of Canada were pending.

(c) The defendant was at such elections the Liberal-

Conservative candidate for the south riding of Ontario, and one Burnett, a brother-in-law of the plaintiff, was the Liberal candidate.

(d) The plaintiff had actively opposed the defendant in previous election contests, and again did so, and strongly supported Burnett; the plaintiff had also previously publicly boasted of his ability and intention to defeat the defendant at the election.

(e) The plaintiff asserted that he alone, by virtue of his superior position as Cabinet Minister, controlled the appointment of registrar.

(f) The plaintiff, in order to secure the election of Burnett and to defeat the defendant, purposely kept the office of registrar vacant and held it up as a prospective reward for political services in securing the defeat of the defendant.

(g) Prior to the occasion referred to in the fifth paragraph of the statement of claim, the defendant had been credibly informed, and then verily believed that, by assurances and promises made by the plaintiff to certain of his political friends, that he would, in consideration of services to be done in said election, appoint such persons or some or one of them to the office of registrar, the plaintiff caused and induced such person or persons, or some or one of them, to raise large sums of money and to use the same corruptly in such election for the purpose of defeating the defendant.

6. The matters set forth in the fifth paragraph hereof became and were matters of public notoriety, discussion, and interest prior to and on the occasion referred to in the fifth paragraph of the statement of claim.

7. The occasion referred to in the fifth paragraph of the statement of claim was the occasion of a meeting of the Liberal-Conservative party of South Ontario and those who had been and were political friends and supporters of the defendant, and was the first public occasion on which the defendant had had an opportunity of meeting with and addressing his political friends and supporters after his

defeat at the polls in June, 1896, and was a privileged occasion.

8. The statements alleged to have been made by the defendant on the occasion referred to, respecting the plaintiff or his dealings with the registry office, were so made at a meeting of the defendant's own political friends and supporters, and were so made in good faith and solely by way of fair comment upon and criticism of the political conduct of the plaintiff as set forth in the fifth paragraph hereof and in reference thereto, and were made by the defendant without any malice and in the honest belief that the circumstances set forth in the fifth paragraph hereof (in the sense that such promises were made as are referred to in sub-paragraph *g*), really existed, and were true, and such comment and criticism were fair and upon matters of deep public interest, and for the benefit of the public, and not otherwise, and were privileged.

In the alternative, and by way of mitigation of damages, the defendant says that, without malice and believing the statements referred to in the fifth paragraph hereof to be true, the defendant stated the same under the circumstances referred to.

The motion to strike out paragraphs 5, 6, 7, and 8 was made upon the ground that they were so framed as to embarrass the plaintiff and to confuse issues which might properly be raised, and were otherwise objectionable, as well as being untrue in fact and not good in law.

The motion was argued before Mr. Cartwright, an official referee, sitting for and at the request of the Master in Chambers, on the 20th and 21st May, 1897.

C. J. Holman, for the plaintiff.

R. McKay, for the defendant.

Judgment was delivered on the 1st June, 1897.

MR. CARTWRIGHT.—It seems to me that the defendant is entitled to plead in mitigation of damages as he has

done under the authority of *Pursley v. Bennett*, 11 P. R. 64. It may possibly be open to the defendant to avail himself of such a plea; and I therefore am not able to see how it can be struck out, after the decision in *Stratford Gas Co. v. Gordon*, 14 P. R. 407. A great many authorities were cited on the argument, which was very full and instructive. I have read through the examination of the defendant, and I have examined most of the authorities cited, and I confess I do not see that as a matter of pleading the plaintiff has any right to what the motion asks for. The plaintiff's own statement of claim sets out his public character, and it was said by Lord Herschell in *Davis v. Shepstone*, 11 App. Cas. at p. 190: "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct." Before that in *Wason v. Walter*, L. R. 4 Q. B. 73, at p. 88, Cockburn, C. J., had said that it was of the utmost importance to the welfare of the country that the proceedings alike of the courts of justice and of the legislature should be fully reported, however great the inconvenience that might arise therefrom to individuals.

In such a case as the present it may well be that the jury may think, or perhaps may not think, that what the defendant may be proved to have said exceeded the limits of fair comment. And it may be that at the trial the occasion when the statements complained of were made may be held not to have been one of privilege. But these are matters which I have no power to consider or to speculate upon.

After the best consideration I can give to the case and after perusal of the authorities, I do not see that there is anything set up in the later paragraphs of the statement of defence, or in the way in which those defences are pleaded, that would justify me in striking them out or in requiring an amendment.

There is nothing objectionable here, as there was in *Rassam v. Budge*, [1893] 1 Q. B. 571. There is nothing here like setting up a different statement from that set out in the statement of claim, and then proceeding to justify. Here the defendant denies having made the statements complained of, and then proceeds to defend himself, first, by setting up that the occasion in any event was privileged—and, as it seems to me, he sufficiently states the grounds for making that claim—whether they are sufficient or not it will be for the Judge at the trial to determine, after hearing the evidence on that point. The defence then alleges that whatever may have been said on the occasion complained of was fair comment on the admitted facts, and this, too, is a question for decision at the trial, and not in Chambers. I do not think that I can even strictly look at the examination of the defendant as being any element in the proper decision of this motion. This defence will have to be tested according to the rule laid down in *Davis v. Shepstone*, already quoted. And these allegations which are relied on as proving the pleas of fair comment and privilege are set up again by way of mitigation of damages, or as tending to shew absence of malice, even if they do not strictly constitute defences to the action itself.

After having heard the full and learned arguments of counsel and consulted the authorities, I can only arrive at the conclusion that I should be exceeding the functions of the Master in Chambers if I were to give effect to the motion. The motion must fail, and the costs should be to the defendant in the cause. If the pleas are bad in law, that is no reason for striking them out in Chambers: *Glass v. Grant*, 12 P. R. 480. Their sufficiency can be tested in the usual way.

The plaintiff appealed from the order of the referee, and his appeal was argued by the same counsel before MOSS, J.A., sitting in Chambers for and at the request of BOYD, C., on the 11th June, 1897.

Judgment was delivered on the 21st June, 1897.

MOSS, J. A.—The first four paragraphs of the statement of defence are not objected to, but the plaintiff contends that the remainder of the defence is so framed and the allegations relating to one species of defence so intermingled with those relating to other defences, as to confuse the issues and tend to embarrass the plaintiff at the trial.

Mr. McKay, for the defendant, fully explained in his argument the scope and effect of the paragraphs of the defence following the fourth. But without this explanation it is, I think, difficult for the reader to get with any certainty at what is intended to be relied upon.

The seventh paragraph is clearly out of place, interposed as it is between paragraphs relevant to a defence of a different nature. It should, I think, follow the fourth paragraph, and in that position would not, even as framed, be open to any objection that it was likely to embarrass the plaintiff.

Mr. McKay, in supporting the remaining paragraphs, claimed that the fifth and eighth should be read together, the sixth and seventh being passed over in the interim, and that thus read in connection with the sixth as following the fifth and eighth, there clearly appear upon the record sufficient defences of fair comment upon or criticism of the plaintiff's acts as a public man, and matter that may properly be pleaded in mitigation of damages.

Accepting that way of treating the pleading, the sixth paragraph should have been placed just before that portion of the eighth beginning with the words, "in the alternative," and the latter part of the eighth should then become a separate paragraph.

Thus arranged the defences on the record will be so stated as to relieve the plaintiff from any serious apprehension of embarrassment.

But the plaintiff should not be driven to spell out the defences in this way. He is entitled to have them set forth in such manner as will enable him upon reading them to form a fairly correct judgment as to their scope and meaning and as to what is intended to be relied upon under them.

Still the defendant ought not to be shut out from setting up any matter which he may properly plead either in bar or by way of mitigation of damages.

I think the proper order should be to direct the defendant to amend, rearranging the paragraphs of the defence so as to group the separate defences under their appropriate heads, and making such other amendments as may be necessary for that purpose or otherwise.

Costs of the motion and appeal to be costs in the action.

DALE V. WESTON LODGE I. O. F.

Costs—Scale of—Jurisdiction of Taxing Officer—Rule 1174.

Where there has been a trial of an action, and the plaintiff has thereat been awarded costs, Rule 1174 gives no jurisdiction to the taxing officer to deal with the scale of costs.

Brown v. Hose, 14 P. R. 3, distinguished.

Andrews v. City of London, 12 P. R. 44, applied and followed.

[June 26, 1897.—*Moss*, J. A.]

AN appeal by the plaintiff from the certificate of one of the taxing officers at Toronto, upon the taxation against the defendants of the plaintiff's costs of the action, which was brought in the High Court of Justice by the widow and administratrix of the estate of George Dale to recover from the defendants sick benefits, funeral benefits, and widow's benefits. The action was tried in the usual way by MEREDITH, J., who gave judgment for the plaintiff as administratrix for \$127.70 for sick and funeral benefits, and for her as widow for \$250 for widow's benefits, with costs. Upon appeal by the defendants, the Court of Appeal reduced the former amount by \$87.70, leaving the plaintiff entitled to recover \$40 and \$250 and costs, (see 24 A. R. 351). The officer ruled that the plaintiff was entitled to her costs on the County Court scale only, and so taxed them.

The appeal was argued before MOSS, J. A., sitting in Chambers for and at the request of BOYD, C., on the 18th June, 1897.

Masten, for the plaintiff, contended that the action could not have been brought in an inferior Court; that there was no liquidation by the act of the parties of the amounts claimed in the action; and that the officer had no jurisdiction, under Rule 1174* or otherwise, to enter upon the ques-

*1174. In every case in which judgment is entered without trial, or the decision of a Court or Judge, or order as to the costs, and where the amount of judgment, *prima facie*, appears to be within the jurisdiction of an inferior Court, the taxing officer shall not tax full costs of the High

tion of the scale of costs, but was bound to tax High Court costs.

F. C. Cooke, for the defendants, contra.

Judgment was delivered on the 26th June, 1897.

Moss, J. A.—The combined effect of the judgment pronounced by Meredith, J., and the certificate of the result of the appeal to the Court of Appeal, is that the defendants are adjudged liable to pay to the plaintiff the sum of \$40 for funeral benefits and \$250 for widow's benefits, and also to pay to the plaintiff the costs of the action, to be taxed.

Upon taxation the taxing officer ruled that the plaintiff was only entitled to costs on the County Court scale, and has taxed them in that way.

The plaintiff objects that the taxing officer has no jurisdiction to determine the scale in this case; that it is not a case in which judgment is being entered without trial, or the decision of a Court or Judge, or order as to costs; and so Rule 1174 does not apply.

For the defendants it is contended that Rule 1174 applies to every case, unless the judgment or order as to the costs indicates the scale, and that this is the construction placed upon the rule in *Brown v. Hose*, 14 P. R. 3.

I do not understand the learned Chancellor to have intended his observations in that case to have application beyond the particular order as to costs which was there under consideration.

In *Andrews v. City of London*, 12 P. R. 44, there had been by consent a verdict for the plaintiff for \$1, subject to be increased according to the result of a reference, and the order provided that the costs should abide the event. The reference resulted in an award of \$85 in favour of the plaintiff, and the taxing officer taxed the

Court, without proof on affidavit to his satisfaction that the action was properly instituted therein; and if properly within the jurisdiction of the County, or Division Court, then the taxation shall be on the scale of fees in such Court.

plaintiff's costs on the County Court scale. Upon appeal Mr. Justice Proudfoot reversed the ruling of the taxing officer, and held the plaintiff entitled to costs on the High Court scale. The defendant appealed to the Divisional Court, and the matter was argued before the Chancellor and Justices Proudfoot and Ferguson. The decision was to restore the taxing officer's ruling. Rule 1174 (then numbered 511) was discussed, and one of the questions under consideration was whether the judgment was being entered without a trial. Dealing with this, Mr. Justice Ferguson says, at p. 47: "The question here is as to whether or not there was a trial, for if there was a trial, the case could not fall under the provisions of this Rule 511." The conclusion of the Court on the question whether there was or was not judgment without a trial was expressed by the learned Chancellor, at p. 45, as follows: "Such a reference as this is to be regarded as one in which final judgment is obtained without a trial, according to the latest decision * * ; and the costs therefore depend on Rule 511." Mr. Justice Proudfoot agreed in restoring the ruling of the taxing officer, remarking that Rule 511, which had not been referred to on the argument before him, was entirely applicable to the case.

It is apparent from the opinions in that case that if the Court had come to the conclusion that there had been a trial, the jurisdiction of the taxing officer to deal with the scale of costs would not have been upheld. See also *McGarvey v. Town of Strathroy*, 11 P. R. 57, at p. 59.

I do not understand the learned Chancellor as intending in *Brown v. Hose* to differ from the view taken in *Andrews v. City of London*. He points out that the application of Rule 1174 is to cases where judgment is being entered in actions of the apparent competence of the lower Courts, without the intervention of the Court or a Judge as to the costs, and adds: "The order made by consent in this case simply provided that the plaintiff should get costs, but that did not imply, as I think, full costs of action, unless it be a case for suing in the High Court. The juris-

diction of the taxing officer is not ousted unless the order indicates the scale of costs." He was referring to the order under consideration, which had been made by consent, and so, he held, was an order without the intervention of the Court or Judge as to the costs.

In this case, there having been a trial, and the plaintiff having thereat been awarded her costs of the action, I am unable to read Rule 1174 as giving any jurisdiction to the taxing officer to deal with the scale of costs.

I think I must allow the appeal, but it is proper, under the circumstances, that I should do so without costs.

LYON V. RYERSON.

*Mortgage—Notice of Sale—Abandonment—Costs—Action on Covenant—
Motion for Summary Judgment.*

After the issue of the writ of summons and service of a notice of motion for summary judgment in an action upon the covenant for payment contained in a mortgage deed, the plaintiff, without the leave required by R. S. O. ch. 102, sec. 30, served notice of exercising the power of sale contained in such deed. Before the hearing of the motion, the plaintiff gave notice of abandonment of his notice of sale and of all costs in respect thereof :—

Held, that the effect of the notice of sale was to give the defendant time within which to pay off what was claimed, and, unless the defendant was willing to release the plaintiff, he was bound by the notice ; and the motion for judgment could not be entertained ; but the object of R. S. O. ch. 102, sec. 30, would be fully attained by directing that the motion should stand over until after the expiration of the thirty days mentioned in the notice.

[June 1, 1897.—*Mr. Cartwright.*]

[June 14, 1897.—*Falconbridge, J.*]

MOTION by the plaintiff for summary judgment under Rule 739.

The action was brought to recover the amount due under the covenant for payment contained in a mortgage deed.

The writ of summons was issued on the 6th May, 1897, and, the defendant having appeared, the plaintiff on the 26th May, 1897, served notice of this motion for judgment

On the 28th May, 1897, the plaintiff served a notice of exercising the power of sale contained in the mortgage deed, without having obtained any order under R. S. O. ch. 102, sec. 30,* permitting him to do so. The notice of sale demanded payment of the mortgage moneys, and stated that unless payment should be made within thirty days, the mortgaged premises would be sold.

On the 31st May, 1897, the plaintiff's solicitor served a notice on the defendant's solicitor of abandonment of such notice and of all costs in respect thereof.

The motion for judgment came on for hearing before Mr. Cartwright, an official referee, sitting for the Master in Chambers, on the 1st June, 1897.

Worrell, Q. C., for the defendant, contended that the motion must fail because of the service of the notice of sale.

T. W. Howard, for the plaintiff, contra.

Judgment was delivered on the same day.

MR. CARTWRIGHT.—For the plaintiff it was contended that the notice of sale could be abandoned, and that, upon this being done, the plaintiff was remitted to the position in which he stood when the motion for judgment was launched.

* 30.—(1) In order to prevent the making of unnecessary and vexatious costs in respect to mortgages, it is hereby enacted that, where pursuant to any condition or proviso contained in a mortgage there has been made or given a demand or notice either requiring payment of the moneys or any part thereof secured by such mortgage, or declaring an intention to proceed under and exercise the power of sale contained in such mortgage, no further proceedings and no action either to enforce such mortgage, or with respect to any clause, covenant, or provision therein contained, or the lands or any part thereof thereby mortgaged shall, until after the lapse of the time at or after which, according to such demand or notice, payment of the moneys is to be made, or the power of sale is to be exercised or proceeded under, be commenced or taken unless and until an order permitting the same shall first be had and obtained either from the Judge of a County Court or from a Judge of the High Court.

For the defendant it was argued that the words of the statute were imperative; and the plaintiff, having taken the course he did, could not afterwards revoke his own act; that he was in the position of a person who had exercised an election, and could not now revoke it without the consent of the defendant; and that if his action on the covenant was stayed, it was by his own act, and he had no reason to complain.

Apparently the point is new. The only authority cited was *Cruso v. Bond*, 9 P. R. 111, 1 O. R. 384, to which I was referred by Mr. Worrell as shewing that a plaintiff cannot ask for something and then decline to receive it. The judgment of Mr. Dalton (which, in the result, was affirmed by the Divisional Court, 1 O. R. 384), seems to me satisfactory.

Here the plaintiff was entitled either to rely on his action on the covenant or to proceed under his power of sale. For what must be assumed to have been sufficient reasons, he chose the latter alternative. Can he now be allowed to change back to the former position?

When the notice of sale was served, it gave the defendant an opportunity to raise the amount necessary within thirty days, or such other time as the notice allowed. By this voluntary act the plaintiff thus gave the defendant a further time to make arrangements to meet the claim at the expiration of the period limited by the notice. Upon this, it seems to me, the defendant was entitled to rely, and is entitled to invoke the provisions of the statute and demand that matters shall remain in *statu quo* until the time given him by the notice has expired.

For the plaintiff it was argued that the object of the Act was "to prevent the making of unnecessary and vexatious costs in respect of mortgages," and that the costs of the notice of sale having been abandoned, the object of the statute was gained. I scarcely think, however, that this is to be assumed. The words used seem to require a wider application.

It is said in *Cruso v. Bond*, 1 O. R. at p. 387: "It is a

good rule to apply as far as possible in all judicial proceedings, that where anything is sought by a party, he should be treated as prepared to receive what he asks for."

The effect of the notice of sale was to give the defendant time within which to pay off what was claimed ; and unless the defendant is willing to release the plaintiff, he is bound by the terms of the notice.

I think, therefore, both on this ground and on the construction of the statute, that the motion for judgment must fail, with costs to the defendant in the cause only, as the point is new.

The plaintiff appealed from this decision, and his appeal was argued by the same counsel before FALCONBRIDGE, J., in Chambers, on the 7th June, 1897.

Judgment was delivered on the 14th June, 1897.

FALCONBRIDGE, J.—I agree in the main with the learned referee, for the reasons stated in his written opinion, wherein he has worked out the matter with his usual care and good judgment.

But, inasmuch as the plaintiff's motion for judgment was launched before he made the mistake of serving his notice of sale without leave of a Judge, it seems to me that (the plaintiff having abandoned the notice of sale and all costs in respect thereof) the object of the statute will be fully attained by directing the motion for judgment to stand over to be heard as soon as the thirty days mentioned in the notice of sale shall have elapsed.

Order accordingly. Costs here and below to be costs in the cause to the defendant.

I think this disposition of the case does not conflict with anything that is said in *Cruso v. Bond*, 9 P. R. 111, 1 O. R. 384.

HAACKE V. WARD ET AL.

Service of Papers—Posting up Copies—Rule 1330—Judgment—Irregularity.

Where service of a statement of claim and notice of motion for judgment was effected, under Rule 1330, by posting up a copy of each in the office in which the proceedings were conducted :—

Held, that the posting up of one copy only for two defendants was not to be deemed service on either ; and a judgment founded thereon was set aside as irregular.

[May 15, 1897.—*Mr. Cartwright.*]

[June 14, 1897.—*Falconbridge, J.*]

MOTIONS by the defendants respectively to set aside the judgment in the plaintiff's favour granted by the Court on the 6th of April, 1897, upon motion, in default of defence, no one appearing for the defendants, upon the ground, amongst others, that such judgment was irregular, because (the defendants not having appeared) one copy only of the statement of claim and of the notice of motion for judgment was posted up in the office in which the proceedings were conducted, and the judgment was against both defendants.

Rule 1330 provides as follows: “ * * where a defendant served with a writ of summons * * has not duly appeared thereto, all writs, notices, orders, appointments, warrants, and other documents, proceedings and written communications, not requiring personal service upon the party to be affected thereby, shall, unless the Court otherwise directs, be deemed to be sufficiently served upon the party, by posting up a copy in the office in which the proceedings are being conducted.”

The motion was argued before Mr. Cartwright, an official referee, sitting for and at the request of the Master in Chambers, on the 14th of May, 1897.

C. J. Holman, for the defendant Heise.

J. W. McCullough, for the defendant Ward.

G. C. Campbell, for the plaintiff.

Judgment was delivered on the following day.

MR. CARTWRIGHT.—The irregularity relied on by the defendants was that the provisions of Rule 1330 had not been complied with, because one copy only of the statement of claim and notice of motion was posted up in the office in which the proceedings were conducted. It was argued that by Rule 1330 service by posting is to be deemed to be sufficient service only when the Rule is duly complied with, and that the posting up of one copy only for two defendants is not to be deemed service on either.

Mr. Campbell did not dispute the fact of only one copy having been posted. He contended, however, that the taxing officers in such cases allowed for one copy only, and that the copy so posted would not be removed from the central office, but would remain there for the information of all concerned. In his view the posting is similar to service by publication of an advertisement.

The motion, after argument, was retained in order that I might ascertain what was the practice adopted here in such cases.

I have since consulted the taxing officers, who state that the point could not arise on taxation, as four copies would properly be taxable in such a case as the present, and no more, though this would leave only one for posting. The practice in the taxing office does not, therefore, afford any guide.

On the other hand, I am informed by Mr. Lee that it is a constant practice for solicitors and parties to obtain from the central office the copies so posted up, and this seems to me to be agreeable to the reason of the Rule, which makes such posting equivalent to service, so that the defendant, or his solicitor, in such a case, would be presumed to know that he could obtain his copy of the papers thus served by applying at the central office.

In the absence of any authority, I am bound to use my own judgment, and leave the parties to carry the matter further, if so advised.

I therefore direct that the judgment be set aside as irregular, and that the costs of this motion be to the defendants in any event.

The plaintiff appealed from this decision, and his appeal was argued by the same counsel before FALCONBRIDGE, J., in Chambers, on the 14th June, 1897.

FALCONBRIDGE, J., later in the same day, after consideration, dismissed the appeal with costs to the defendants in any event, agreeing with the opinion expressed by the referee.

BOURNE ET AL. V. O'DONOHUE.

Judgment by Default — Setting Aside — Discretion — Terms — Defence — Merits—Rule 796.

Under Rule 796 the Court has a discretion to set aside any judgment by default upon proper terms. Where such judgment is a final one, the Court is not in a position to exercise a discretion, unless the defendant shews at least some such plausible defence as he would have to shew on resisting a motion for judgment under Rule 739. The Court will not try the defence so asserted, but affidavits may be received, or the defendant may be cross-examined upon his own, for the purpose of enabling the Court to determine how far there is a *bonâ fide* defence of the nature of that set up; and, a *fortiori*, his application may be met by documents under his own hand, not explained or answered, shewing that such defence is non-existent.

Order of a Divisional Court affirmed.

[June 30, 1897.—*The Court of Appeal.*]

AN appeal by the defendant from an order of a Divisional Court dismissing his appeal from an order of MEREDITH, J., in Chambers, affirming an order of the Master in Chambers refusing a motion to set aside judgment by default for non-delivery of a statement of defence in an action to recover land. Leave for this appeal was granted by a Judge in Chambers: *ante* p. 274. The facts are stated in the judgment.

The appeal was argued before BURTON, C. J. O., and OSLER, MACLENNAN, and MOSS, JJ.A., on the 12th May, 1897.

Meek, for the appellant.

Masten, for the plaintiffs.

Judgment was delivered on the 30th June, 1897.

OSLER, J. A.—The only question is whether the defendant has made out a case under Con. Rule 796 for setting the judgment aside and being let in to defend.

The Rule provides that any judgment by default may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as the Court or Judge may think fit.

Under the former practice at law, where final judgment was signed on default of appearance to a writ specially indorsed, the Court or a Judge might "let in the defendant to defend, upon an application supported by satisfactory affidavits accounting for the non-appearance and disclosing a defence upon the merits:" C. L. P. Act, C. S. U. C. ch. 22, sec. 56. In such a case, as I recollect the practice, it was not enough for the defendant simply to swear that he had a good defence upon the merits. He was obliged to disclose or make known the nature of his defence, so far at all events as to satisfy the Court or Judge that there really was a defence upon the merits proper to be tried: *Vidal v. Bank of Upper Canada*, 15 C. P. 421. The English decision followed here was *Whiley v. Whiley*, 4 C. B. N. S. 653, not *Warrington v. Leake*, 11 Ex. 304. "Disclosing," it was said, manifestly pointed to something more than a mere statement of the existence of a defence. Where, however, the defendant had appeared and judgment—not a final judgment—was afterwards signed for default of plea, the practice was different. Though it was wholly discretionary in the Court or Judge to grant an application to set it aside, it was almost a matter of course to do so upon what was known as the ordinary affidavit

of merits, that is to say, an affidavit stating merely that the defendant was advised and believed that he had a good defence to the action on the merits. Yet, even on such an application, the Court would so far admit of an inquiry into the nature of the defence intended to be pleaded, that they would not set the judgment aside in order to give the defendant an advantage of any nicety of pleading, or of any matter which did not go to the merits of the cause: Archbold's Queen's Bench Practice, 12th ed., vol. 2, p. 988.

We have now a new practice, under which, by the Rule referred to above, the Court has a discretion to set aside any judgment by default upon proper terms. Where such judgment is a final judgment, I cannot understand how the Court can be in a position to exercise any discretion on the subject, unless the defendant shews at the very least some such plausible defence as he would have to shew on resisting a motion to enter judgment under Rule 739. Otherwise why should the plaintiff be deprived of his final judgment?

Here the defendant, on moving to set aside the judgment, filed nothing but the common affidavit of merits. The plaintiff, anticipating or assuming that the real defence was under the Statute of Limitations, filed an affidavit setting forth letters and documents signed by the defendant, conclusively, as it appears to me, displacing every shadow of a defence of that kind. In his affidavit in reply, the defendant, while in terms asserting such a defence, made no attempt whatever to explain away or answer these letters, etc. He contended that no affidavit answering his defence could be filed, and that the defence could not be tried on the motion. In that I agree to this extent, that the Court will not try the defence, but I have no doubt affidavits may be received, or the defendant may be cross-examined upon his own, for the purpose of enabling the Court or Judge to determine how far there is a *bonâ fide* defence of the nature of that attempted to be set up. *A fortiori* may his application be met by documents under his own hand, not explained or an-

swered, shewing that such defence is non-existent. I refer to *Wilson v. Town of Port Hope*, 10 U. C. R. 405 ; *Richardson v. Howell*, 8 Times L. R. 445.

With the view I have expressed accords, I think, the English practice, as illustrated by such cases as *Davis v. Spence*, 1 C. P. D. 719 ; *Wright v. Mills*, 60 L. T. N. S. 887 ; *Watt v. Barnett*, 3 Q. B. D. 363 ; *Furden v. Richter*, 23 Q. B. D. 124.

I am obliged to say that, in my opinion, the judgment should be affirmed.

BURTON, C. J. O., and MACLENNAN and MOSS, JJ.A., concurred.

ELMSLEY ET AL. V. HARRISON ET AL.

Amendment—Pleading—New Case Made at the Trial—Statute of Frauds.

The decision of a Divisional Court (*ante* p. 425) that the defendant was, under the circumstances of the case, entitled to set up the Statute of Frauds, and thereby to defeat the action, was affirmed on appeal

[June 30, 1897.—*The Court of Appeal.*]

AN appeal by the plaintiffs from the judgment of a Divisional Court (*ante* p. 425) allowing the appeal of the defendant Harrison from the judgment of MEREDITH, C. J., and dismissing the action with costs.

The appeal was heard by BURTON, C.J.O., and OSLER, MACLENNAN, and MOSS, JJ.A., on the 21st May, 1897.

E. T. English, for the appellants.

E. D. Armour, Q.C., and *E. B. Brown*, for the defendant Harrison.

Judgment was delivered on the 30th June, 1897.

MACLENNAN, J.A.—The case made by the statement of claim is that the defendants are overholding tenants, with

rent and taxes in arrear, under a lease which has expired; that the lease contained a stipulation for renewal, which was lost by forfeiture, without shewing how; and the relief sought is payment of rent and taxes, possession of the land, and a declaration that the right of renewal no longer exists.

The defence is a general denial, and a right to a renewal of the lease, averring that the defendant has appointed an arbitrator to fix the rent for the new term, and that the plaintiff R. Elmsley has made no appointment on his part, as required by the lease. To this the said plaintiff replies that by an instrument dated on or about the 5th December, 1895, the defendant offered to fix the rent at a certain sum, which offer the plaintiff accepted, but that the defendant refused to carry out the agreement or to pay rent or to give up possession. On the argument before us the appellants relied on the letters of the 5th and 18th December, as constituting an agreement in writing, and they also relied on a parol agreement, made on the 14th December, fixing the rent, and sought to preclude the respondent from the benefit of the Statute of Frauds, on the ground that it had not been pleaded.

I am of opinion that the two letters relied upon are not a sufficient contract in writing. The first, which is signed by the respondent, and is the only writing signed by him, does not specify the land in question either expressly or by reference. It refers to a "lease which has just expired." But it would require parol evidence to shew that the lease referred to was the Fletcher lease, mentioned in Mr. Elmsley's letter of the 18th. I also think that the letter of the 18th is not an unqualified acceptance of the offer contained in the letter to which it was an answer. He accepts the offer with the suggestion of another term as to insurance. I think this suggestion can only be regarded as a proposal for the respondent's acceptance of an additional term of the agreement, without which the appellants did not intend to be bound. There is, therefore, as I think, for both these reasons, no sufficient evidence of an agreement in writing.

Then, as to the parol agreement, it was argued that the rent was settled verbally, and without any condition as to insurance, on the 14th December. The statement of claim does not set up any agreement at all fixing the rent for a new term, either written or verbal; but, on the contrary, alleges that the right of renewal has been lost by forfeiture. It is by way of reply that the agreement fixing the rent is alleged, but neither does the reply charge the defendant as upon a verbal agreement, but upon a written offer, "by an instrument dated on or about the 5th December, 1895." The defendant did not need to set up the Statute of Frauds against that charge: *Odhams Brothers v. Brunning*, 13 Times L. R. 65, cited by Street, J.

The reply was clearly a contravention of Rule 419, as inconsistent with the statement of claim, and the new ground on which the case was thereby put ought to have been by amendment, which could be made under Rule 424, and not by reply. If the plaintiffs had set up a parol agreement by amendment, either before or after defence, the defendant could have set up the statute, and he had a clear right to do so the moment the plaintiffs attempted to prove or rely upon a parol agreement which they had not yet pleaded. Having regard to the plaintiffs' pleadings and to the correspondence, I do not think either party imagined they had made any verbal agreement at all, or intended to do so. But whether they did or not, the defendant was entitled to set up the statute, whenever an attempt was made to prove such an agreement.

I think the appeal should be dismissed.

Moss, J.A.—Neither before us, nor, as far as appears, in either of the Courts below, did the defendant contend that his letter of the 5th December, 1895, lacked any of the elements required to make it a sufficient note or memorandum with reference to the 4th section of the Statute of Frauds, so as to bind the defendant, if it had been unconditionally accepted by the plaintiffs, either verbally or in writing.

It refers to the receipt of a letter from the plaintiff R. Elmsley, and it seems probable that there was previous correspondence by reference to which the Fletcher lease, the assignment to the defendant, and the lands described in them, were so sufficiently identified as to satisfy the statute, and counsel on both sides very probably considered it unnecessary that it should be put in at the trial.

If there had been any doubt as to the identity of the property, it might have been cleared up by parol testimony: *Plant v Bourne*, 13 Times L. R. 470, and cases there cited.

Moreover, the letter of the 5th December, 1895, was distinctly set up by the plaintiffs in their reply, and if the defendant had desired to contend that it was not sufficient with reference to the statute, he should have pleaded it, as he might have done. But he did not do so, and he now only seeks to plead it for the purpose of avoiding an alleged agreement altogether outside of that letter. I think we should assume that there was in writing on the 5th December, 1895, an offer which, if accepted by the plaintiffs, would have bound the defendant to an agreement sufficiently evidenced under the statute.

But, assuming this, how stands the plaintiffs' case? They might have verbally accepted the offer contained in the letter, and so have bound the defendant. But they did not do so, and, instead, the plaintiff R. Elmsley wrote the letter of the 9th December. Admittedly, this was not an unconditional acceptance, for it sought to impose an additional term or condition which was not accepted or agreed to by the defendant, but, on the contrary, was rejected. If the matter had stopped here, there was a complete end to any liability of the defendant upon his offer: *Hyde v. Wrench*, 3 Beav. 334; Fry on Specific Performance, 3rd ed., secs. 304 and 305.

The plaintiffs could not afterwards, without the defendant's consent, treat the offer as still open to acceptance.

It then lay upon the plaintiffs to shew, if they could, that afterwards the defendant consented to reopen the matter

and treat the negotiation as still on foot, and that ultimately there was a completed agreement arrived at between them. But this would be shewing a new bargain; not that set up in the pleading, but one that, if set up in pleading, was not capable of being proved by parol, if the Statute of Frauds was pleaded.

The defendant rightly objected at the trial that the parol evidence which was admitted was not being given for the purpose of shewing the offer and acceptance set up in the reply, but a new bargain made after the offer contained in the letter of the 5th December had been put an end to, both by the plaintiffs' letter of the 9th December and the defendant's positive refusal to accept the terms offered in it, and that the new bargain was not set up in the pleadings, and the defendant had, therefore, no opportunity of pleading to it the defence of the Statute of Frauds.

If the plaintiffs had been then driven to amend, the defendant could not have been denied the right to amend also so as to meet the new case presented. So, if it was proper to permit the plaintiffs to adduce the evidence without a pleading, it could not be improper to permit the defendant to be in the same position, and to give him liberty to object to the reception of the parol evidence, notwithstanding that the statute had not been set up in pleading; and he ought to have been given leave to set up the statute in bar of the parol agreement put forward in evidence by the plaintiffs.

And all the Judges below agree that in face of the statute the plaintiffs must fail from inability to prove a binding agreement.

BURTON, C.J.O., concurred.

OSLER, J.A.—I concur in the judgment of my brother Moss.

Appeal dismissed with costs.

MAY V. WERDEN.

MAY V. BEDINGFIELD.

Security for Costs—Prior Action—Costs Unpaid—New Plaintiff—Notice—Nominal and Insolvent Plaintiff.

Security for costs may be ordered where the costs of a former action for the same cause are unpaid, even although the actions are not between precisely the same parties, if the plaintiffs are suing substantially by virtue of the same alleged title.

McCabe v. Bank of Ireland, 14 App. Cas. 413, followed.

And where the title to property, the subject of the present and a former action of ejectment, was shifted into the hands of the present plaintiff to evade, if possible, the effect of an order requiring the plaintiff in the former action to give security for costs—the former action having been dismissed for default of such security—and it appeared that the present plaintiff knew the history of the prior litigation, an order for security for costs was affirmed.

The order was also maintainable upon the ground that the plaintiff was a person of no substance, and the action brought mainly, if not entirely, for the benefit of some unknown and unnamed person, not a party to the record.

[October 3, 1895.—*Boyd, C.*]

[June 30, 1897.—*Divisional Court.*]

APPEALS by the plaintiff from orders of the Master in Chambers requiring the appellant to give security for the costs of the defendants in the two actions, upon the grounds that he was a person of no substance and merely a nominal plaintiff, and that the actions were brought for substantially the same causes as another set of actions brought by one Kilner, which were dismissed with costs for default of security for costs, and that the costs of such former actions remained unpaid. The facts are stated in the judgments.

The appeals were argued before BOYD, C., in Chambers, on the 30th September, 1895.

J. A. Donovan, for the plaintiff.

J. M. Godfrey, for the defendant Werden.

A. B. Armstrong, for the defendant Bedingfield.

Judgment was delivered on the 3rd October, 1895.

BOYD, C.—These actions are substantially in ejectment for the possession of lands at Mimico; they are substan-

tially and even formally the same as another set of actions brought by one Kilner on the same title in respect of the same lands, which were dismissed with costs because he failed to give security for costs in these actions as ordered by the Court.

Upon the evidence and materials before me, there is no doubt that the present plaintiff was aware of the adverse possession by the defendants; that it had continued for some years; and that he was buying a law suit when he obtained a conveyance from Kilner. I have also no doubt that he is affected with notice of the fact and the termination of the prior actions, both through his solicitor, Brown, and through the registration of the orders dismissing these prior actions before he had closed his transaction with Kilner for the conveyance of the land. The alleged securities were not handed over, and the "deal" was not completed, till the 14th June, 1895. This the plaintiff states on his examination. His solicitor, Donovan, states, on his examination, that Mr. Brown, who acted for May, had full knowledge as to the suits and the facts before he parted with the securities. This was on the said 14th June, when the money, \$50, was paid and the conveyance handed over.

This conveyance, though dated 15th May, 1895, was not operative till the 14th June, and it was not registered till 18th June, 1895. Prior to this registration, the order dismissing the previous actions was registered, on the 12th June, 1895; so that the plaintiff cannot shelter himself under the Registry Act, and apart from the Registry Act he clearly had constructive notice of the litigation by the knowledge of adverse possession, and the knowledge possessed by the solicitor Brown, to whom the plaintiff says he left the whole affair.

I agree with the deduction of the Master from the whole evidence, that the property was shifted into the hands of the present plaintiff to evade, if possible, the effect of the orders requiring security for costs, and that all the parties had before them, and were acting in view of, the history

of the prior litigation. It is very obvious that the plaintiff is a person of no substance; there has been against him for years, as he admits a Division Court execution, upon which no levy could be made. This was so at the date of the examination (the 18th September, 1895), but he says that he made a settlement of this judgment the next day. His evasive and unsatisfactory answers as to his property do not assure one that he is a person of any substantial means; if so, he should have it made to appear in some reasonable way when the opportunity was afforded him several times during the examination.

There is inherent power in the Court to intervene by requiring security in respect of the prior actions, "even although the actions were not between precisely the same parties or persons suing in the same capacity, inasmuch as they were suing substantially by virtue of the same alleged title:" Lord Herschell in *McCabe v. Bank of Ireland*, 14 App. Cas. 413, at p. 415.

The order may also be supported on the ground indicated in *Gordon v. Armstrong*, 16 P. R. 432. Kilner says he sold the land at a fair value, but on the figures it appears that the plaintiff is interested in a very small part of the value (if any), as he has mortgaged it to Kilner for the greater part of the purchase money—\$9,950 out of \$11,000—the rest being made up of \$50 obtained by May from his wife, and by her from some one else (whom he will not name), and of a mortgage of \$1,000 on lands, the locality of which he will not give (in order that the ownership and value of them may be ascertained). Now Kilner sold as a bare trustee—he had no interest in the land—and it must be assumed that he holds the securities upon the same trusts, for all information to the contrary has been withheld on the part of the plaintiff; and this ultimate beneficiary is a person unknown, whose name is refused to be given on the part of the plaintiff. It seems very plain, in all the circumstances, both what have been disclosed and what have been left undisclosed, that the action is mainly, if not entirely, for the benefit of some unknown and unnamed

person, not a party to the record. See also *Egan v. Kirkaldy*, 3 Ir. L. R. 542; *Burke v. Hutchinson*, 7 Ir. Eq. R. 508; and *Tenant v. Brown*, 5 B. & C. 208.

The judgment of the Master in another of the actions has been affirmed on the merits by Mr. Justice Rose, and it would be my duty to follow that decision, even if I did not agree with it.

But I think, on the lines I have indicated, that the orders in appeal should be sustained with costs to the respondents.

The case is a peculiar one, and it is within the competence of the Court to apply the rules as to security for costs to the circumstances of this litigation.

The plaintiff appealed in due course from the Chancellor's decision in *May v. Werden*, but the hearing of the appeal was adjourned until after the determination of the action of *May v. Logie*, 27 O. R. 501, 23 A. R. 785, which was of a similar character, and in which the Supreme Court of Canada gave judgment (27 S. C. R. 443), against the plaintiff, on the 1st May, 1897.

The appeal was argued before a Divisional Court composed of FERGUSON and MACMAHON, JJ., on the 15th June, 1897.

J. A. Donovan, for the appellant.

W. E. Middleton and *J. M. Godfrey*, for the defendant.

Judgment was delivered on the 30th June, 1897.

FERGUSON, J.—This is an appeal from the judgment of the Chancellor in this and another action, *May v. Beddingfield*, delivered on the 3rd day of October, 1895, affirming an order made by the Master in Chambers on the 27th day of September, 1895, whereby it was ordered that the plaintiff should, within four weeks from the date of the said order, "furnish" security for the defendant's costs of the action, including the costs then already incurred, in

the penal sum of \$400; or, in default, that the action be dismissed with costs; that the costs of that application should be costs in the cause; and that all proceedings should in the meantime be stayed.

The argument of this appeal took place on the 15th day of June, 1897. There is a large number of actions of the same character, and arising out of the same transactions, all brought by this plaintiff, and the reason for the long delay in the hearing of this appeal has been that one of such actions might, in the meantime, proceed to judgment, when it was thought more light would be cast upon the matters in contention here. This delay was not, as I understand, opposed or complained of by any of the parties or persons concerned.

That action, *May v. Logie*, has been prosecuted to judgment, and a copy of the judgment of the Supreme Court therein is now produced as part of the material here, without objection.

Since the argument of this appeal, I have perused, as I think, with care, all the evidence and the documents upon which the Master in Chambers proceeded in making his order, as appears by the order itself, and all the evidence and documents referred to by counsel on the argument, without having found anything that appears to me a reason or ground for saying or thinking that the judgment appealed from is wrong or in any degree erroneous; but, on the contrary of this, I am of the opinion that the judgment is perfectly right.

The law upon the subject seems to be fairly well understood. It was not the subject of much, if any, dispute between counsel. The contentions were chiefly, if not wholly, as to matters of fact depending upon the true effect of the evidence; and I cannot entertain any real doubt that the evidence sustains the conclusion arrived at by the learned Master and by the Chancellor.

I think the appeal should be dismissed with costs.

MACMAHON, J., concurred.

VANSICKLE V. AXON ET AL.

Discovery—Production of Documents—Affidavit—Objection to Produce—Specification of Document.

Where, in an affidavit of documents made in compliance with the usual order for production, only one document is mentioned, and the possession or control of other documents is negatived, the statement "I object to produce the said document" complies with Rule 513 and sufficiently specifies the document mentioned in the affidavit which the defendant objects to produce, although no information is given as to its date, nature, or contents.

[June 14, 1897.—*Moss, J. A.*]

[September 7, 1897.—*Divisional Court.*]

AN appeal by the plaintiff from an order of the local Judge at Hamilton dismissing a motion by the plaintiff for an order requiring a further and better affidavit of documents from the defendant Frederick Axon, pursuant to the usual order for production of documents obtained by the plaintiff.

The affidavit filed was as follows: "(1) I have in my possession or power a certain document relating to the matters in question in this action. (2) I object to produce the said document. (3) The naming or production of said document might tend to criminate me, or would tend to bring a criminal prosecution against me for a crime of which I am in fact innocent, but for which I might be criminally prosecuted. (4) I have no other documents in my possession or power relating to the matters in question in this action," etc.

The grounds of appeal are stated in the judgment.

The appeal was argued before MOSS, J. A., sitting in Chambers for and at the request of BOYD, C., on the 11th June, 1897.

James Dickson, for the plaintiff.

Douglas Armour, for the defendant Frederick Axon.

Judgment was delivered on the 14th June, 1897.

Moss, J. A.—Two grounds of appeal were taken by the notice.

1st. That the defendant had not sufficiently described or specified the documents in his possession in the affidavit on production filed.

2nd. That the defendant had not sufficiently and properly claimed privilege for the documents which he objects to produce.

Upon the argument Mr. Dickson confined himself to the first ground, frankly stating that he could not contend that there was not a sufficient claim of privilege, if the document was sufficiently specified or identified.

This reduces the question to whether the first and second paragraphs of the affidavit sufficiently describe or identify the document in respect of which the privilege is claimed.

Only one document is referred to in the first paragraph as being in the possession of the defendant; and the last paragraph negatives the possession by him of any other than the document referred to in the first paragraph.

Rule 513 provides that the affidavit to be made by a party against whom an order for production has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and the affidavit may be in the form given in the Appendix, with such variations as circumstances may require.

The form shews that it is designed for the case of the party making it having more than one document in his possession, some of which he is willing to produce, and some of which he objects to produce.

In a case where there are documents of both kinds mentioned in the affidavit, it is of course proper that the deponent should specify with some particularity which of them he objects to produce; and in such case he ought not to merely refer to them as "certain documents, letters," etc., without further identification: *Taylor v. Batten*, 4 Q. B. D. 85.

But where only one document is mentioned in the affidavit, I think an averment such as is made in the second paragraph of the affidavit in question, "I object to produce the said document," does sufficiently specify

the document mentioned in the affidavit which the defendant objects to produce.

The plaintiff examined the defendant for discovery, and a number of questions were addressed to him with reference to documents in his possession, and it appears to me that sufficient was elicited, notwithstanding the refusal to answer some of the questions, to inform the plaintiff fairly well as to the particular document the defendant is protecting from production.

I affirm the order of the local Judge, with costs to the defendant in the cause.

The plaintiff appealed from this decision, and his appeal was heard by a Divisional Court composed of MEREDITH, C. J., and ROSE and MACMAHON, JJ., on the 7th September, 1897.

R. McKay, for the plaintiff.

Lynch-Staunton, for the defendant Frederick Axon, was not called on.

THE COURT affirmed the decision of MOSS, J. A., and dismissed the appeal with costs to the defendant Frederick Axon in any event.

TORONTO TYPE FOUNDRY CO. V. TUCKETT.

Action—Dismissal—Default—Rules 434, 542.

Rule 434 provides that "in actions in the county of York, to be tried without a jury, if the plaintiff does not set down the action for trial within six weeks after the pleadings are closed and proceed to trial as provided in Rule 542, the action may be dismissed for want of prosecution" :—

Held, that unless there is default both in setting down and in proceeding to trial, an action cannot be dismissed.

[September 11, 1897.—*The Master in Chambers.*]

MOTION by the defendant for an order dismissing the action for want of prosecution in not setting it down for trial and proceeding to trial within the time required by the Rules. The action was pending in the county of York, and the pleadings were closed more than six weeks before the 1st September, 1897, on which day the Revised and Consolidated Rules of Practice took effect. No jury notice had been given.

The following of these new Rules are applicable :—

434. In actions in the county of York, to be tried without a jury, if the plaintiff does not set down the action for trial within six weeks after the pleadings are closed and proceed to trial as provided in Rule 542, the action may be dismissed for want of prosecution.

542.—(1) Actions to be tried at Toronto, without a jury, may be set down for trial by either party immediately after the close of the pleadings.

(2) Notice of trial * * shall be given by the party setting down the action for trial, within 2 days thereafter, and he shall, within 4 days after so setting down the action, file the notice of trial and proof of the service thereof with the officer by whom the action was set down.

(3) Where default is made in filing the notice of trial as aforesaid, any party who has been served therewith may, within 4 days after such default, file in like manner the notice of trial served on him and proof of the service thereof.

(4) Where a notice of trial is filed, as aforesaid, the ac-

tion shall be placed by the proper officer upon the list of cases for trial upon the expiration of three weeks from the date of the setting down.

(5) If more parties than one have caused the action to be placed on the list of cases for trial, it shall be tried in the order of the first entry.

The motion was argued before the Master in Chambers on the 10th September, 1897.

H. Cassels, for the defendant.

C. W. Kerr, for the plaintiffs.

Judgment was delivered on the following day.

THE MASTER IN CHAMBERS.—It was contended by counsel for the defendant that the plaintiffs having omitted to set down the action for trial within six weeks after the close of the pleadings, the defendant was entitled to have the action dismissed. In my opinion, before the defendant is entitled to the order of dismissal under this Rule, not only must the plaintiffs have made default in setting down the action for trial within six weeks from the close of the pleadings, but they must also have made default in proceeding to trial as provided by Rule 542. At the time this motion was launched the plaintiffs, while in default in not having set the case down, were not in default as to proceeding to trial as provided by Rule 542. This last Rule came into operation on the 1st September. Notice of this motion was served on the 2nd September, before the plaintiffs could have proceeded under Rule 542. Immediately upon service of the notice of motion, the plaintiffs proceeded to the trial of the action as provided by Rule 542.

If I am right in my opinion as to the default necessary before an order to dismiss can be made, then the defendant herein was premature in moving, and the order must be refused with costs to the plaintiffs in the cause.

GRIFFIN V. FAWKES ET AL.

Discovery—Production of Documents—Deeds Relating to Plaintiff's Title.

To deny the due execution of a deed sought to be protected, or to set up that it is forged, or to plead *non est factum*, does not give the defendant a right to have it produced on an affidavit of documents, where the deed is a part of the title to be proved at the hearing by the plaintiff; for the onus of proving it lies upon him, and if he fails he can go no further.

Frankenstein v. Gavin's Cycle Co., [1897] 2 Q. B. 62, followed.

[September 16, 1897.—*The Master in Chambers.*]

[September 22, 1897.—*Street, J.*]

[October 4, 1897.—*Divisional Court.*]

MOTION by the defendants Shadrach and Drusilla Fawkes for an order directing the plaintiff to file a further and better affidavit on production of documents. The action was brought to enforce an award made by Mr. S. H. Blake, Q. C. The plaintiff in her affidavit of documents claimed protection for certain documents (more particularly referred to in the judgments) because "the said documents are documents of title, and are not relevant to the defendants case, but are part of my case only, and do not impeach my case."

The documents in question were a mortgage deed, a certificate of discharge, and a deed of conveyance, all relating to the plaintiff's title to certain land in the city of Toronto, the subject of litigation at the time the award was made. The award was based upon the fact that the plaintiff had a title to the land by virtue of these documents. It awarded payment of a sum of money to the plaintiff as a condition of the title becoming vested in the defendant Drusilla Fawkes, and directed that the title held by the plaintiff should be utilized in obtaining the money to discharge the claims of the plaintiff and others.

The motion was argued before the Master in Chambers on the 15th September, 1897.

S. H. Bradford, for the applicants.

W. R. Smyth, for the plaintiff.

Judgment was delivered on the following day.

THE MASTER IN CHAMBERS.—It is admitted that the plaintiff has certain letters in her possession that were omitted to be produced. Her counsel agrees to produce these. In addition to these, however, she has documents for which privilege is claimed in her affidavit on production. The privilege is properly claimed, but upon her examination for discovery she states what these documents are. From this information it appears that they are, first, a deed signed by her in favour of Mrs. Fawkes; second, a discharge of a mortgage signed by one Kidd; the mortgage was one given by the plaintiff's husband to Kidd.

I have read over the pleadings and examination of Mrs. Griffin, and I am of opinion that the defendants Fawkes are entitled to have these documents produced for inspection. There is no question of the plaintiff's title to the land arising under them, but rather her claim to an inchoate right of dower is impeached by them. Then she claims to have a lien for moneys paid or earned in obtaining these documents. In that case I do not consider that she is in any better position than a mortgagee where fraud is charged, and here fraud is charged. The plaintiff should, I think, under the circumstances, produce these documents at once, say before 12 o'clock of the 17th September instant. The defendants moving will be entitled to the costs of application in any event.

The plaintiff appealed from the Master's order, and her appeal was argued before STREET, J., in Chambers, on the 20th September, 1897.

W. R. Smyth, for the plaintiff, relied on *Frankenstein v. Gavin's Cycle Co.*, [1897] 2 Q. B. 62.

S. H. Bradford, for the defendants, cited *Attorney-General v. Emerson*, 10 Q. B. D. 191.

Judgment was delivered on the 22nd September, 1897.

STREET, J.—Mr. Blake's award is based upon the assumption that the plaintiff holds certain title deeds, which are the

documents sought to be protected. The plaintiff is suing upon the award, and the defendants deny that she holds these deeds, and deny that she ever did hold them.

Upon this issue the parties are going to trial, and the plaintiff must prove her case. By the terms of the award, I take it, the possession and delivery over of the deeds and the payment of the sum awarded to the plaintiff are to be concurrent acts, and the plaintiff must shew herself to be in a position to obtain the money by producing the deeds at the trial and proving them. If she fails to do so, she must fail in the action.

Under these circumstances, it appears to me that the claim to protection as set out in the affidavit on production is well taken under the authorities—and I can find nothing which I can properly treat as displacing it. To deny the due execution of a deed sought to be protected, or to set up that it is forged, or to plead *non est factum*, does not give the defendant a right to have it produced on an affidavit of documents, where the deed is a part of the title to be proved at the hearing by the plaintiff, for the onus of proving it lies upon him, and if he fails he can go no further: see *Frankenstein v. Gavin's Cycle Co.*, [1897] 2 Q. B. 62.

In my opinion, the appeal should be allowed with costs payable upon taxation.

The defendants Shadrach and Drusilla Fawkes appealed from the order of STREET, J., and their appeal was argued by the same counsel before a Divisional Court composed of BOYD, C., FERGUSON and MEREDITH, JJ., on the 4th October, 1897.

THE COURT, at the conclusion of the argument, affirmed the decision of STREET, J., and dismissed the appeal, with a variation of the order upon a point immaterial to the decision. Costs in the cause.

D'IVRY V. WORLD NEWSPAPER COMPANY OF TORONTO
ET AL.*Appeal—Time—Extension of—Special Circumstances—Terms.*

Where notice of appeal was given, but the appeal was not set down in due time, and a sittings of the Court had been lost, the time for setting down was extended; as it appeared that there had all along been a *bonâ fide* intention of appealing, that security had been given for a large part of the debt and costs, and a large sum paid for a copy of the evidence. The terms of giving further security, setting down the appeal within a limited time, and paying costs in any event, were imposed.

[October 20, 1897.—*MacLennan, J. A.*]

[November 9, 1897.—*The Court of Appeal.*]

MOTION by the plaintiff for the costs of an abandoned appeal by the defendants from the judgment at the trial in favour of the plaintiff in an action for libel, and to set aside reasons of appeal not served in due time, under the circumstances stated in the judgment.

The motion was argued before MACLENNAN, J. A., in Chambers, on the 19th October, 1897.

H. M. Mowat, for the motion.

King, Q. C., for the defendants, contra.

Judgment was delivered on the following day.

MACLENNAN, J.A.—Judgment signed 15th April, 1897; notice of motion by way of appeal, 11th May, for the September Sittings. On 13th April order obtained by the defendants for stay of execution until appeal set down in due course upon securing debt and costs by bond to the amount of \$750; and that security given soon afterwards. On the 17th May the evidence was ordered from the reporter, and copy ready 17th August. No reasons of appeal were served with the notice of appeal, nor was the appeal set down for the September Sittings; and it is not yet set down, as required by Rules 804 and 814 of 1st January, 1896. No application was made by

the defendants for an extension of time; the appellants' solicitor having an impression that he would not be held strictly to time.

An objection was made that the notice of the present motion is irregular, having been served at five minutes past four o'clock. That is an objection which I would have allowed to be amended by new service, if necessary, as the delay in the service was occasioned by the solicitor having lately changed his office. Mr. King, however, answered the motion on the merits, and the objection became immaterial.

The appellants are clearly out of time, and the respondent is strictly entitled to the relief which she asks under Rule 826.

Inasmuch, however, as it is evident that the defendants had all along a *bonâ fide* intention to appeal, I think it is a case in which the time for appealing should be extended. Mr. Maclean and Mr. King both say in their affidavits that the intention to appeal has been *bonâ fide*; and that is further proved by the fact that, with a view to an appeal, security was given for the debt and costs, and a large sum has been paid for a copy of the evidence.

I do not think I ought to put the defendants to the expense of a formal application to have the time extended, unless the respondent insists upon that being done. I think all the materials on both sides, for and against such an application, are now before me. I think, however, the time should only be extended upon the terms of security being given for the costs of the appeal, to the amount of \$200; and if the debt and costs in the Court below exceed the security already given, security should be given for the excess as well. The appellants should also pay the costs of this application, to be costs in the appeal in any event.

The appeal may be set down according to the practice in force before the new Rules, and the security must be given as above within ten days; and, in default, the plaintiff to have costs as of an abandoned appeal.

From this decision the defendants appealed to the Court, and the appeal was heard by BURTON, C.J.O., and OSLER and MACLENNAN, JJ.A., on the 9th November, 1897, the same counsel appearing.

THE COURT affirmed the order.

BOYD V. DOMINION COLD STORAGE COMPANY ET AL.

Security for Costs—Court of Appeal—Special Order—Judicature Act, 1895, sec. 77—Foreign Domicil—Company—Winding-up—Property in Jurisdiction.

Where both the appellants were domiciled out of Ontario, and one of them, an incorporated company, was in process of winding-up in the Province of Quebec under R. S. C. ch. 129 :—

Held, having regard to secs. 17, 39, and 66 of that Act, that the property of the company in Ontario was beyond reach of the process of the Court; and the circumstances were such that a special order for security for costs of the appeal should be made under Rule 1487 (803) of the 1st January, 1896, taken from sec. 77 of the Judicature Act, 1895.

Grant v. Banque Franco-Egyptienne, 2 C. P. D. 430, and *Whittaker v. Kershaw*, 44 Ch. D. 296, followed.

[October 15, 1897.—*MacLennan*, J.A.]

AN application by the plaintiff, under the circumstances stated below, for a special order under Rule 1487 (803)* of the 1st January, 1896, requiring the defendants to give security for the costs of their appeal to the Court of Appeal from the judgment in favour of the plaintiff entered after the trial.

*803. On any appeal to the Court of Appeal, * * no security shall be required for costs or damages, unless such security is specially ordered by the Court to which the appeal is made or a Judge thereof.

By Rule 826 of the Revised and Consolidated Rules which came into force on the 1st September, 1897, it was provided as follows: Unless otherwise ordered by the Court of Appeal or a Judge thereof, an appeal to the Court of Appeal shall not be allowed unless before delivering his reasons of appeal, the appellant gives security that he will effectually prosecute his appeal and pay such costs as may be awarded in case the judgment appealed from is in whole or in part affirmed.

The judgment appealed against was pronounced on the 5th May, 1897 (see *ante*, 468); the appeal therefrom was launched before the 5th June, 1897; and notice of this motion was served on the 16th June, returnable on the 19th June, 1897.

After several enlargements, the motion was heard by MACLENNAN, J. A., in Chambers, on the 23rd September, 1897.

A. J. Boyd, for the plaintiff.

George Bell, for the defendants.

Judgment was delivered on the 15th October, 1897.

MACLENNAN, J. A.—Appeal from a judgment of Street, J., in favour of the plaintiff. The defendants are a joint stock company operating in the Province of Quebec. Pending the action, an order was made in a Quebec Court for winding-up. Thereupon an order was made allowing the action to proceed, and the liquidator applied to be made, and was made, a defendant. At the hearing judgment was for the plaintiff, with costs against both the company and the liquidator. The company, and the liquidator, who is resident in Québec, are appellants, and this motion is for an order that the appellants give security for the costs of the appeal.

The grounds relied on are a want of *bona fides* in the appeal, and that it is brought with a view to coerce a settlement, and that both appellants are domiciled without, and have no property within, the jurisdiction.

I think the ground of want of *bona fides* was sufficiently answered by the affidavits read by Mr. Bell; and the only other ground is the non-residence. On the argument I gave an opportunity to shew that the appellants had property in Ontario exigible under execution, and an affidavit was filed during vacation that the company was possessed of a leasehold property in Toronto, known as the old drill shed, together with certain rights and privileges con-

nected therewith, the rights of the company therein being estimated to be of the value of \$10,000 at least, or \$4,500 over and above the liens against it. This affidavit has not been replied to, but the respondent relies on the objection that the company being in process of winding-up, the leasehold interest would not be available to answer the costs of the appeal.

The Rule on the subject is the new Rule 803 of the 1st January, 1896, copied from the statute, sec. 77 of 58 Vict. ch. 12, which says that "no security shall be required for costs or damages, unless such security is specially ordered by the Court to which the appeal is made or a Judge thereof." The corresponding English Rule is Order LVIII., Rule 15, which declares that "such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal." In *Grant v. Banque Franco-Egyptienne*, 2 C. P. D. 430, the Court of Appeal decided that the fact that an appellant was a foreigner residing abroad, without assets in England, was a special circumstance within that Rule. In that respect, I think there is no substantial distinction between our Rule and the English Rule. What is required under each is that there be special circumstances, and, therefore, unless the leasehold interest which the company possesses is a sufficient answer, the application must succeed.

It would clearly be a sufficient answer but for the fact that the company is now in process of being wound up. The respondent cites secs. 17, 39, and 66 of the Winding-up Act, R. S. C. ch. 129, as shewing that this leasehold interest is beyond reach by any process of this Court or the High Court in this Province, to answer costs, and can only be reached by application in the winding-up; and such is the undoubted effect of those sections. That being so, the property, for all purposes of the costs of the appeal, might just as well be in the Province of Quebec, and, therefore, it in no way meets the reason for the Rule.

A good many cases were cited on behalf of the respondent,

in which appellant companies were ordered to give security. Some of these were decisions under sec. 69 of the Companies Act of 1862, which, though analogous to Order LVIII., Rule 15, is differently worded, and the decisions under it are therefore not of the same value. There are several, however, under Rule 15 which support the present application: *Re Photographic Artists' Association*, 23 Ch. D. 370; *Re Diamond Fuel Co.*, 13 Ch. D. 400; *Northampton Coal Co. v. Midland Waggon Co.*, 7 Ch. D. 500: and I think that *Whittaker v. Kershaw*, 44 Ch. D. 296, is conclusive of the question. That is a decision of the Court of Appeal, and decided that it was no answer to an application for security that the appellant was a married woman who had separate property, but which was subject to a restraint from anticipation. The Court there said that the question was whether the appellant had property against which payment could be enforced.

Here both of the appellants are without the jurisdiction and neither of them has any property within the jurisdiction against which payment of the costs can be enforced in case the appeal fails. These are, in my opinion, special circumstances sufficient to require the appellants to give security. There should, therefore, be a stay of proceedings on the appeal until security for costs is given either by deposit or bond, to the amount of \$200.

DENISON V. WOODS.

Payment into Court—Defence—Payment Out—Election—Time—Con. Rules 632 et seq.—Appeal—Removal of Stay of Proceedings.

In an action to recover money for services rendered, the defendant pleaded that \$325 was more than an ample and sufficient payment; that he had before action paid the plaintiff \$25, and had always been ready and willing and was now ready and willing to pay him \$300 more; that before action he had tendered \$300 in payment of the services rendered, but the plaintiff refused to accept it; and the defendant brought \$300 into Court in satisfaction of all claims and demands of the plaintiff in this action:—

Held, that the defence was so framed that if the plaintiff had desired to take the money out of Court, he must have elected to do so before replying or before the expiration of the time for replying, as provided by Con. Rule 636, and must have taken it in satisfaction of all his claims in the action, and have filed and served a memorandum in accordance with Con. Rule 635. But, as he, instead of taking this course, proceeded with the action (in which he recovered more than \$300), the defendant was absolved from his offer, and the money remained in Court subject to further order; the defendant was entitled, in the absence of special circumstances, to have it remain to be dealt with when the case should be finally disposed of; and it was open to the defendant to contend upon appeal that the amount recovered should be reduced below \$300, notwithstanding the payment into Court, by the plaintiff's election not to take the money out at the appropriate time.

[October 25, 1897.—*Moss, J. A.*]

THIS was an action brought in 1896 to recover \$573, a balance claimed by the plaintiff, an architect, for professional services rendered to the defendant upon an arbitration. The defendant before action paid the plaintiff \$25 on account, and also before action made a tender to the plaintiff of the sum of \$300 in full of any balance due him. The defendant in his statement of defence delivered in January, 1897, denied all the allegations in the plaintiff's statement of claim save such as were expressly admitted; he admitted a qualified retainer of the plaintiff. The 8th, 9th, and 10th paragraphs of the defence were as follows:—

8. For all work done and expenses incurred for or on account of services rendered the defendant by the plaintiff pursuant to his retainer in connection with the matters in respect of which the plaintiff was engaged by the defendant, or for which the plaintiff is in any way entitled to demand remuneration or reward from the defendant, the

defendant says and the fact is that the sum of \$325 will be more than an ample and sufficient payment.

9. The defendant on or about the 14th day of May, 1896, paid to the plaintiff on account of the services so rendered and for his accommodation the sum of \$25, before any bill or account was rendered by the plaintiff to the defendant, and the defendant has always been ready and willing, when and ever since the plaintiff rendered his account, and is now ready and willing, to pay the plaintiff the further sum of \$300 for his services as aforesaid.

10. Before this action was brought the defendant made tender of the sum of \$300 in payment of such services aforesaid to the plaintiff, who refused to accept it, and the defendant has now paid into Court the said sum of \$300 in satisfaction of all claims and demands of the plaintiff in this action against him.

The defendant paid into Court at the time of delivering his defence the sum of \$300.

The plaintiff joined issue upon the statement of defence.

The action was referred for trial to an official referee, who reported on the 29th May, 1897, that the plaintiff was entitled to \$397.50 in all, or the sum of \$72.50 over and above the \$25 and the \$300 paid into Court. Both the defendant and the plaintiff appealed from this report, and both appeals were dismissed on the 2nd October, 1897. The defendant then appealed to the Court of Appeal, and paid into Court the sum of \$72.50, the balance found due to the plaintiff from him, and the further sum of \$200 as security upon such appeal.

The plaintiff moved before a Judge of the Court of Appeal, upon notice, for an order under new Rule 829 removing the stay of proceedings imposed by Rule 827 upon security being given, so far as necessary to enable him to obtain out of Court the sum of \$300 paid in by the defendant with his defence, and for an order for payment out of such money, upon the ground that the defence of tender and the other defences contained in the 8th, 9th, and 10th paragraphs of the statement of defence were an admission of the defendant's liability to that extent, in any event.

The motion was argued before MOSS, J. A., in Chambers, on the 21st October, 1897.

Watson, Q. C., for the plaintiff, contended that the money was paid into Court under Con. Rule 640, with a plea of tender, which was equivalent to an admission of liability to that amount.

F. A. Anglin, for the defendant, contended that the paragraphs of the defence above set out merely indicated the purpose of the payment in; that the defendant had always contended and was still contending that the amount due the plaintiff was less than \$300; that the money was paid in under Rule 632, without admission of liability, and could be taken out only in full satisfaction of the cause of action, citing *Kane v. Mitchell*, 13 P. R. 118.

The following of the Consolidated Rules of 1888 (in force at the time of the payment in) are applicable to the question raised by the motion:—

632. A defendant may, either before or at the time of delivering his defence, or afterwards by leave of the Court or a Judge, pay into Court a sum of money in satisfaction of the cause or a part of the cause of action, or one or more of the causes of action for which the plaintiff sues, and the money when so paid in shall remain in Court subject to further order, unless the plaintiff elects to take it out. But the payment of money into Court shall not be deemed an admission of the cause of action in respect of which it is so paid.

635. If the plaintiff takes the money out of Court he shall take it in satisfaction of the very cause of action for which it was paid in, and shall upon applying therefor file and serve a memorandum acknowledging the cause for which he takes it out, which may be according to the Form No. 22 in the appendix, and shall be equivalent to a satisfaction piece.

636. The plaintiff shall make his election to take the money out of Court within four days after the day on which he receives notice of payment in if the payment is

made before defence, and if the money is paid in with the defence, he shall elect, either before replying or before the expiration of the time for replying, whichever first happens.

640. With a defence setting up a tender before action, the sum of money alleged to have been tendered must be brought into Court.

Judgment was delivered on the 25th October, 1897.

Moss, J. A.—The defence is so framed that if the plaintiff desired to take the \$300 out of Court, he was obliged to elect to do so before replying or before the expiration of the time for replying, as provided by former Rule 636, and was bound to take it in satisfaction of all claims and demands of the plaintiff in the action, and to file and serve a memorandum according to the form mentioned in former Rule 635.

The plaintiff did not elect to take this course, but proceeded with the action. The defendant was thereby absolved from his offer, and the money remains in Court subject to further order.

And I think the defendant is entitled—in the absence, at all events, of special circumstances—to have it remain to be dealt with when the case is finally disposed of. The appeal to this Court is a step in the cause, and the defendant is now contending that the amount allowed the plaintiff by the referee should be reduced below the sum of \$300. This, I think, has been left open to him—notwithstanding the payment into Court—by the plaintiff's non-election to take the amount out of Court at the appropriate time.

I do not think any sufficient ground has been shewn for making an order varying the effect of giving security in the appeal as provided by Rule 827.

I am not in a position to make an order for payment out of any part of the money, and a removal of stay to enable the plaintiff to apply to the Court below for such an

order would be but multiplying proceedings. The question of the disposition of the money can be most conveniently dealt with when the action is being finally disposed of after the determination of the appeal proceedings.

I think the motion must be refused. Costs to be costs in the appeal.

PALADINO V. GUSTIN.

Security for Costs—Slander—52 Vict. ch. 14, sec. 1, sub-sec. 3 (O.)—Meaning of Words Used—Good Defence.

In an action for slander brought by a married woman the words alleged to have been spoken were, "you are a blackguard; you are a bad woman;" and the innuendo was that the plaintiff was a common prostitute and a woman of evil character. Upon an application by the defendant under 52 Vict. ch. 14, sec. 1, sub-sec. 3 (O.), for security for costs, the defendant admitted having called the plaintiff "a bad, quarrelsome woman," but said he did not recollect using, and believed he had not used, the word "blackguard," and he denied that he used the words with the meaning attributed to them by the plaintiff:—

Held, MEREDITH, J., dissenting, that the defendant had not shewn a good defence to the action on the merits, and his application was properly refused.

Decision of MACMAHON, J., affirmed.

Per BOYD, C., and FERGUSON, J., that the expressions used might be employed in circumstances and surroundings such that bystanders might think them a statement of want of chastity.

Per MEREDITH, J., that as it was shewn by the pleadings and the affidavit of the defendant that there was a real and substantial question for the jury to pass upon, and upon which the action might fail, the defendant had shewn a good defence upon the merits.

[October 1, 1896—*MacMahon*, J.]

[October 20, 1897.—*Divisional Court*.]

AN appeal by the defendant from an order of the senior local Judge at London dismissing an application by the defendant for an order requiring the plaintiff (a married woman) to give security for costs under the Ontario Act 52 Vict. ch. 14, sec. 1, sub-sec. (3), in respect to the cause of action for an alleged slander contained in the plaintiff's statement of claim.

In addition to the claim for damages arising out of the alleged slander, the plaintiff claimed damages for an assault and battery alleged to have been committed upon her by the defendant.

The slander charged in the statement of claim was that the defendant, on the 25th day of August, 1896, in a public market square in the city of London, in the presence of numerous bystanders, in the hearing of such bystanders, and in a loud voice, falsely, maliciously, and unlawfully, said of and concerning the plaintiff the following words, that is to say: "You are a blackguard; you are a bad woman:" meaning thereby that the plaintiff was a common prostitute and a woman of evil character.

The affidavit of the defendant filed in support of the application for security for costs verified the statement of claim, and alleged that the plaintiff was not possessed of property sufficient to answer the costs of the action, and stated that he had a good defence upon the merits. A second affidavit of the defendant stated as follows: "I deny having used the words attributed to me in the statement of claim; I did say to the plaintiff that she was a bad, quarrelsome woman, meaning that she was quarrelsome, but I did not say or mean, or in any way insinuate, and I did not intend to say, mean, or in any way insinuate, that the plaintiff was a prostitute or a woman of evil character, and I have no recollection whatever of having made use of the word 'blackguard,' and I believe I did not use it."

The provisions of sec. 1 of the Law of Slander Amendment Act, 1889, 52 Vict. ch. 14, so far as material, are as follows:—

(1) In any action of slander for defamatory words spoken of any woman and imputing or meaning that such woman has committed or been guilty of either adultery, fornication, or concubinage, it shall not be necessary to allege in the plaintiff's statement of claim, or to prove at the trial, that any special damage resulted to the plaintiff from the utterance of such words, but the plaintiff may recover

nominal damages without averment or proof of special damage.

(3) In any such action, the defendant may, at any time after the filing of the statement of claim, apply to the Court or a Judge for security for costs, upon notice and an affidavit by the defendant shewing the nature of the action and that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment be given in favour of the defendant, and that the defendant has a good defence to the action on the merits, or that the grounds of action are trivial or frivolous; and the Court or Judge may make an order that the plaintiff shall give security for the costs to be incurred in such action, and the security so ordered shall be given in accordance with the practice in cases where a plaintiff resides out of the Province, and the order shall be a stay of proceedings until the proper security is given as aforesaid.

The appeal was argued before MACMAHON, J., at the London weekly sittings, on the 19th September, 1896.

E. R. Cameron, for the defendant.

H. C. Pope, for the plaintiff.

Judgment was delivered on the 1st October, 1896.

MACMAHON, J.—It was not controverted by the plaintiff that she was without property to answer for the costs, in case the verdict or judgment was against her.

In *Snell v. Snow*, 13 Metc. (Mass.) 278, the defendant said of the plaintiff, "she is a bad girl, a very bad girl, and unworthy to be employed by any company in Lowell," the innuendo in the declaration being "that the plaintiff was a prostitute, and had been guilty of fornication." It was held that the declaration was insufficient, for want of averments of exterior facts, which, if true, would give a peculiar force and effect to the words used, or shew that, though in their natural meaning they did not impute unchaste

conduct to the plaintiff, yet, in the connection in which they were used and applied to the plaintiff, they would have that effect ; and that the expansion of the words by the innuendoes could not aid the declaration and make it good.

In *Riddell v. Thayer*, 127 Mass. at p. 490, the Court in giving judgment said : "The party is responsible for the ordinary and natural meaning of language as it would commonly be understood. If the subject of discourse in relation to a female is chastity, the use of the word 'bad' might import the want of conjugal fidelity, if the woman were a married woman."

Under the practice prior to the Common Law Procedure Act, it was necessary to employ prefatory averments in the pleadings to shew that words which otherwise might not be slanderous were spoken in a defamatory sense. But the 61st section of the English Common Law Procedure Act was engrafted on our Libel and Slander Act, R. S. O. ch. 57, the 3rd section of which provides that : "In actions of libel and slander, the plaintiff may aver that the words or matter complained of were used in a defamatory sense, specifying the defamatory sense without any prefatory averment to shew how the words or matter were used in that sense, and the averment shall be put in issue by the denial of the alleged libel or slander ; and where the words or matter set forth, with or without the alleged meaning, shew a cause of action, the statement of claim shall be sufficient."

Odgers on Libel and Slander, 3rd ed., referring to the English Act 54 & 55 Vict. ch. 51, corresponding with our Act 52 Vict. ch. 14, says, at p. 90 : "It is submitted that it" (the Act) "does not apply to any case in which gross epithets are used merely as general terms of abuse ; the words must be such as to convey to the hearers a definite imputation that the plaintiff has in fact been guilty of adultery or unchastity."

The epithet "blackguard" alleged to have been applied to the plaintiff, in addition to the words "a bad woman,"

does not of itself, I think, help the plaintiff; as one definition of "blackguard" is "brutally vicious or scurrilous:" Murray's dictionary—"Blackguard."

I am, therefore, of the opinion that, had it not been for the 3rd section of our Libel and Slander Act, the order of the learned local Judge could not have been sustained. But, as by it prefatory averments are not now required in order to support the meaning attached to the words by the innuendo, the statement of claim must be considered sufficient as a pleading. That being the case, the affidavit of the defendant merely stating that he has a good defence to the action on the merits is not sufficient. *Lancaster v. Ryckman*, 15 P. R. 199, is a case where the defendant's cross-examination on her affidavit was allowed to be used in aid of her affidavit, and thus a *prima facie* case of privilege was made out. See, also, the judgment of Rose, J., in *Lennox v. Star Printing Co.*, 16 P. R. at p. 493, and *Swain v. Mail Printing Co.*, *ib.* at p. 135.

The appeal must be dismissed with costs in the cause to the plaintiff in any event.

The defendant appealed from this decision, and his appeal was heard by a Divisional Court composed of BOYD, C., and MEREDITH, J., on the 12th October, 1896.

W. E. Middleton, for the defendant.

H. C. Pope, for the plaintiff.

Subsequently the Court directed the Registrar to place the case on the list for re-argument.

The appeal was re-argued before a Divisional Court composed of BOYD, C., FERGUSON and MEREDITH, JJ., on the 6th October, 1897.

W. E. Middleton, for the defendant.

J. M. Clark, for the plaintiff.

Judgment was delivered on the 20th October, 1897.

BOYD, C.—According to Murray's dictionary (*sub voce*, No. 6), "blackguard" may be used as a term of the utmost opprobrium to express a low worthless character. It may be used so as to colour the rest of the language. The defendant will not deny using this epithet—he merely does not recollect it—and he admits using the other phrase, "a bad woman." This may, in collocation with the first word, impute a want of decent behaviour and so a want of chastity in the person vilified; as it might have such meaning if used alone. It depends on the surrounding circumstances, of which the jury will have to judge, and it cannot be said that a good ground of defence has been made to appear on the affidavits.

The point of the matter is not what the defendant meant when he used the words "bad woman," but what did the bystanders understand him to mean? That is for the jury to pass upon, and the affidavits are silent on this material aspect of affairs. It cannot be said, therefore, in my opinion, that the defendant has shewn or disclosed a good defence on the merits, and I would affirm the order in appeal, with costs of appeal to the plaintiff in any event.

FERGUSON, J.—So far as the count or statement in slander has concern, the action is brought under the provisions of the Act known as "The Law of Slander Amendment Act, 1889," 52 Vict. ch. 14 (O.).

The slander alleged is that the defendant, on the 25th day of August, 1896, in a public market square in the city of London, in the presence of numerous bystanders, in the hearing of such bystanders, and in a loud voice, falsely, maliciously, and unlawfully, said of and concerning the plaintiff the following words, that is to say: "You are a blackguard; you are a bad woman:" meaning thereby that the plaintiff was a common prostitute and a woman of evil character.

The defendant applied for security for costs under the provisions of sub-sec. 3 of sec. 1 of the Act, and this is his second appeal in the application.

The question as to whether or not the plaintiff is possessed of property to the extent mentioned in that sub-section does not seem to be any longer in controversy. The affidavit of the defendant required by the sub-section seems, in this regard, to be sufficient.

The question, and, as I understand, the only one now, is as to whether or not that affidavit shews that the defendant has a good defence to the action on the merits.

The charge of having spoken the words, in the circumstances stated, with the meaning alleged by the innuendo, is the cause of action. This is the action to which a good defence on the merits is required to be shewn by the affidavit.

It was contended that there was at least a full denial of having spoken the words, and that this alone constitutes a good defence. I do not think that there is on the face of the affidavit such a denial, when the whole affidavit is read.

The defendant, in the affidavit, after making the denial (such as it is), says that he did say to the plaintiff that she was a quarrelsome, bad woman ; and afterwards, in the same affidavit, he says that he has not any recollection whatever of having made use of the word "blackguard," and he believes that he did not use that word. He does not refer to any time or occasion different from those specified by the plaintiff, and doubtless he refers to the same time and place.

This affidavit seems to me to admit saying to the plaintiff, "you are a bad woman," and it says that the defendant is not certain as to whether or not he said to the plaintiff, "you are a blackguard." It seems to me difficult indeed to say that all this, in one paper sworn to by the defendant, amounts to a denial of his having spoken the words alleged.

What the defendant may really have meant or intended to convey by the words he so employed, is wholly immaterial for present purposes, though it is perhaps but "human nature" in some of its phases for him to state *innocency* on the face of the affidavit.

Whenever the words spoken are actionable only in some secondary sense, or by reason of some surrounding circumstances, an innuendo is necessary to the plaintiff's success.

If with their ordinary meaning, the words are perfectly good sense as they stand, facts must be given in evidence to shew that they may have conveyed a special meaning on the particular occasion on which they were spoken, and this being done, a bystander may be asked, "what did you understand by the expression used?" It must be borne in mind that this is altogether different from attempting to explain away the meaning of plain words; for, where the words are well-known and perfectly intelligible English, generally evidence cannot be given to explain their meaning.

The plaintiff is allowed to give evidence of all the "surrounding circumstances," in order to place the jury as far as possible in the position of bystanders that they may judge how the words would be understood on the particular occasion. The jury know what ordinary English means, and need no witness to inform them; but they are entitled to learn by evidence what were the "surrounding circumstances," to enable them to say how the words would be understood by a bystander.

The word "blackguard," ordinarily means a vulgar, base fellow; a ruffian; a scoundrel. It does not appear to me necessary here to refer to the early history or use of the word. Most people have an understanding as to what is meant by it, and, so far as the use of the word has concern, the question is, what would a bystander think was meant by it in the circumstances in which it was used? Strictly, the word may be considered as not being applicable to a female at all; yet, as it appears to me, the man who calls a woman a blackguard should be answerable in respect of the meaning that the ordinary bystander would, in all the circumstances, attach to it.

The word "bad" is opposed to good, denoting a want of good qualities, whether physical or moral. It is a word of

extensive application, and possesses immense capabilities in regard to the variety of its use. It seems to mean (according to books) evil ; ill ; injurious ; noxious ; vicious ; wicked ; dishonest ; and one finds the expression " bad or depraved morals " in books of learning in respect to the meaning of the words of our language.

The word is surely a very common word ; most people have an understanding of its ordinary meaning ; and the real question is, as before, what would the ordinary bystander think was meant by the word when used in the circumstances and surroundings in which it was used.

With, or rather after, the best consideration I have been able to bestow on the subject, I am of the opinion that it is plainly possible that the expression " you are a black-guard," or " you are a bad woman," might be employed in circumstances and surroundings such that bystanders might and would think the expression a statement of want of chastity, and that the person addressed was a common prostitute and a person of evil character. Such circumstances and surroundings may have existed on the occasion in question, and it seems to me entirely possible that the plaintiff may well be able to prove the innuendo laid. This seems to me to be the action that the plaintiff has brought. The statute requires that the affidavit of the defendant should be one shewing that he has a good defence to the action on the merits. With all respect for the opinions of those who think differently, I am of the opinion that the affidavit does not shew what is required as aforesaid. I do not think that the affidavit shews any such defence. If the defendant finds or has found difficulty in an effort to shew what bystanders would consider was meant, in the circumstances and surroundings, by the words he used, this is his misfortune, and he should have thought of it sooner and before using the words.

As before stated, there was only one question to be considered here. I am, for the reasons I have endeavoured to give, of the opinion that this appeal should be dismissed, and the order appealed from affirmed with costs, or, as the

Chancellor has put it, with costs to the plaintiff in any event.

MEREDITH, J.—The intention of the Legislature was that the plaintiff in such an action as this should give security for the costs of it, if not possessed of property sufficient to answer them, and if it appeared that the defendant had a good defence to the action on the merits, or that the grounds of it were trivial or frivolous.

Giving a new right of action, the Legislature saw fit to burden it to that extent.

The Act provides that the defendant may apply for such security for costs, at any time after the filing of the statement of claim, upon notice, and an affidavit by the defendant shewing that the plaintiff is not possessed of property sufficient to answer the costs of the action, in case a verdict or judgment be given in favour of the defendant, and that the defendant has a good defence to the action on the merits, or that the grounds of the action are trivial or frivolous, and that the Court or a Judge may make an order that the plaintiff shall give security for the costs to be incurred in the action.

The plaintiff is admittedly a person of no property or means; and no one has yet suggested that there is no defence to the action on the merits; the question rather is whether a cause of action is disclosed in the pleading, or can be shewn upon the trial.

What, then, is there to relieve this plaintiff from the burden to which she may be subjected under the Act?

I agree that the words alleged to have been spoken might, under extraordinary circumstances, have the meaning attributed to them, and, as it is not now necessary that such circumstances should be set out in the claim, a sufficient cause of action is alleged; but from the statement of claim alone it seems to me sufficiently disclosed that the defendant may succeed upon the merits at the trial; that the difficulties in the way of success there rest mainly upon the plaintiff, who must first satisfy the trial Judge

that the words alleged, if used, are reasonably susceptible of the defamatory meaning alleged, and then satisfy the jury that they were used as alleged, and that as used they did convey the meaning alleged.

The Act gives a cause of action for words spoken of any woman imputing or meaning that she has committed or been guilty of either adultery, fornication, or concubinage ; and, having regard to these words, there seems to me to be much force in the observations of Mr. Odgers, as to the nature of the words constituting such imputation or meaning, referred to in the judgment of MacMahon, J., now in appeal.

Speaking generally—quite apart from any local meaning—"bad" in its primary sense—the opposite of good—would hardly be taken as imputing unchastity ; "a bad woman" might or might not, according to the circumstances in which the words were used, have reference to bad character of that nature, but also of very many other entirely different kinds ; and the word "blackguard," can hardly aid in making out an imputation of unchastity in a woman ; indeed, I should have thought it a word properly applicable only to a man, unless, of course, any peculiar circumstances change the ordinary meaning.

The case, therefore, seems to me the plainest kind of a case for security for costs, according to the intention of the enactment in this respect.

But it is now for the first time suggested that there is a technical difficulty in the defendant's way ; it is admitted that there is a case for trial by jury, and that the defendant may succeed—may succeed upon the plaintiff's case alone ; but it is said that the defence is not disclosed in the affidavit upon which the application for security for costs was made. But is it not ? Does it not appear upon the mere verification of the plaintiff's statement of claim ? I would say that it undoubtedly does. And, besides, the defendant denies speaking the words alleged, and gives the circumstances under which he spoke, saying that, according to his recollection, different words

were used, raising thereby at least an issue, or a defence, of "not guilty." And, again, it may be observed that the power to order security for costs is not expressly made dependent upon the regularity of the defendant's application. The defendant may apply in a certain manner; and the Court or a Judge may make an order; it is not, "may, upon strict compliance by the defendant, make an order."

Whatever may be thought of legislation giving special rights to security for costs, substantial effect must be given to it; we ought not to seek to avoid it by interposing a technical difficulty.

This case seems to me a clear one for giving the defendant the benefit of the statutory restriction upon the ordinary freedom to litigate. I would, therefore, allow the appeal, and make the usual order, under the Act, for security for costs.

The second argument of this case has but confirmed the views which I have already expressed; indeed, it seems to me somewhat farcical for the plaintiff to say that a good defence to the action has not been shewn, that is to say, such an issue of fact as will entitle the defendant to judgment in his favour if he succeed upon either of the questions of fact to be determined by the jury—viz.: Did the defendant use the words attributed to him? And if so, had they the meaning the plaintiff attributes to them? If not—if no defence on the merits—what are the parties going to trial about? It is obvious there is something to try before any question of damages is reached; and if so, surely there is a good defence on the merits shewn; that is, there is a substantial defence which will defeat the action if it is established in evidence at the trial.

It sounds unreasonable to me for anyone to say that no defence is shewn because the defendant has not sworn that bystanders would not attribute to the words alleged to have been used the meaning which the plaintiff's pleadings put upon them. How could he do so? How could any one? And he is not required to swear to the defence, but to shew it, which he does by merely veri-

fying the pleadings, if they disclose it, that is, shew, as here, that there must be and is a real and substantial question for the jury to pass upon, and upon which the action may fall. The plaintiff is in the first place put to the proof of the words he complains of, and his action fails if he does not prove them substantially; it will not do, without amendment, to prove other slanderous words: and having done that, she fails if she does not prove such surrounding circumstances as would give to the words alleged the meaning she puts upon them; failing to obtain a verdict on either question of fact, her action for slander fails altogether; this plainly appears upon the material before us, and therefore it is, in my judgment, abundantly shewn that the defendant has a good defence upon the merits.

HAMMOND ET AL. V. KEACHIE.

Costs—Married Woman—Judgment Against—Costs Payable out of Separate Property—Costs Payable to Married Woman—Set-off.

Judgment for debt and costs having been recovered by the plaintiffs against the defendant, a married woman, to be levied out of her separate estate, there was an appeal by the plaintiffs with regard to the form of the judgment, which was dismissed with costs.

An application to vary the order made upon the appeal by directing that the costs thereof should be set off *pro tanto* against the amount of the judgment was refused; but the Court intimated that the taxing officer, upon taxing the costs of the appeal, would have power under Rule 1164 to set them off *pro tanto* against the costs awarded by the judgment to be levied out of the defendant's separate property.

Pelton v. Harrison (No. 2), [1892] 1 Q. B. 118, followed.

[October 7, 1897.—*Divisional Court.*]

MOTION by the plaintiffs to vary the minutes of the order of this Court of the 27th May, 1897, by directing that the costs of the plaintiffs' appeal thereby dismissed should be set off *pro tanto* against the amount of the judgment for debt and costs recovered by the plaintiffs against the defendant, a married woman (to be levied out of her separate estate), the appeal having been in respect of the form of the judgment. See 27 O. R. 455. The

order as pronounced and settled simply directed that the plaintiffs' appeal should be dismissed with costs to be paid by the plaintiffs to the defendant forthwith after taxation.

The motion was heard on the 17th September, 1897, by a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.

Aylesworth, Q. C., for the plaintiffs, contended that the order of the Court should direct the set-off as asked, citing *Pelton v. Harrison* (No. 2), [1892] 1 Q. B. 118.

F. C. Cooke, for the defendant, *contra*, cited *In re Hewett*, [1895] 1 Q. B. 328.

On the 7th October, 1895, the judgment of the Court was delivered by

ARMOUR, C. J.—We see no reason to vary the judgment we gave in this case dismissing the appeal with costs. The costs will have to be taxed, and upon the taxation of them the taxing officer will have the same power over them as was exercised by the Master in *Pelton v. Harrison*.

See *Pelton v. Harrison*, [1892] 1 Q. B. 118,* Con. Rule 1164.†

* This was a decision to the effect that, although execution as to the costs recovered in the action was limited to the separate property of the defendant, a married woman, these costs could be set off against costs payable to her personally by the plaintiffs on the discharge of an order for a receiver made in the same action. The decision was rendered upon an application to vary the certificate of the taxing Master, who had made the set-off upon taxation.

†1164. Where a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is liable to pay, and may adjust the same by way of deduction or set-off, or may delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or the officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered.

HANNUM V. McRAE ET AL.

Contempt of Court—Witness—Reference—Subpœna—Rule 484—Local Manager of Bank—Principal Officers Resident Outside the Province—Production of Bank Books—Disclosure of Bank Accounts.

Upon a motion by the plaintiff to commit the local manager of a chartered bank, who was subpœnaed to attend before a Master upon a reference, and there to produce the books of the bank and give evidence, for his contempt in not complying with the subpœna :—

Held, that a subpœna may properly be issued to compel the attendance of a witness before a Master, who has jurisdiction by Rule 484.

2. That it was unreasonable to expect the witness to take from the bank the books that were in use and attend during banking hours for the purpose of an examination in a matter in which he had no interest except as a witness ; and it would therefore be proper for the Master to take the evidence at the banking offices after banking hours.

3. That where the head office of the bank is outside of the Province, the local manager is the person in charge and custody of the books, and is the proper person to subpœna to produce them, and should be ordered to do so, more especially where it does not appear that in so doing he will be contravening any rule or regulation of the bank.

Re Dwight and Macklam, 15 O. R. 148, followed.

Crowther v. Appleby, L. R. 9 C. P. 23, and *Attorney-General v. Wilson*, 9 Sim. 526, distinguished.

4. That the witness's objection to produce the books, because the bank was precluded by law from exhibiting to any one or permitting any one to inspect the account of any person dealing with the bank, was untenable, the evidence sought being as to entries made of financial transactions in which a deceased person was engaged, his representatives desiring to know what moneys the bank received and what disposition was made of them, and all parties interested being willing that the evidence should be given.

[November 8, 1897.—*Rose, J.*]

MOTION by the plaintiff for an order for the commitment for contempt of Court of a witness subpœnaed to produce books and give evidence before a local Master upon a reference, under the circumstances set forth in the judgment.

The motion was heard by ROSE, J., at the Ottawa Weekly Court, on the 23rd October, 1897.

F. R. Latchford, for the plaintiff.

Travers Lewis, for the witness.

Judgment was delivered on the 8th November, 1897.

ROSE, J.—This was a motion to commit Montague A. Anderson, manager of the Ottawa branch of the Union

Bank of Canada, for contempt of Court in not producing before a Master of this Court, to whom this matter was referred at the trial for inquiry and report, the several books and papers mentioned in the subpoena *duces tecum*; (2) for not having made any effort to acquaint himself with the dealings and transactions between the bank and the executors of the late John Nicholson; (3) and for refusing to answer certain questions put to him, as appears from a copy of his examination produced on the motion.

The Union Bank has its head office in the Province of Quebec, where, I believe, reside the president, directors, and general manager.

Mr. Anderson appeared in answer to the subpoena, and was sworn. He said as follows:—"I am here in answer to the subpoena. I am manager of the Ottawa branch of the Union Bank of Canada. I have brought no books or documents with me in answer to the subpoena, and I do not intend to bring any. My reasons for not producing them are as follows:—The first is that many of the books sought to be produced by the plaintiff are in constant daily use. 2nd. That I am the servant of the bank, and that it does not come within the scope of my authority to produce or remove the bank's books or papers, which are the property of my employers, and not my property, and are in the custody of the bank under direction of the board of directors. 3rd. That the bank is precluded by law from exhibiting to any one or permitting any one to inspect the account of any person dealing with the bank. 4th. That in an action such as this suit, for the reasons above given, I am unable to produce the bank's books or papers called for by the plaintiff.

"I have been acquainted all along, as far as my memory serves me, with the contents of these books and papers so far as they relate to the dealings with the bank of the executors of the Nicholson estate. I have not made an effort to make myself acquainted with them for the purposes of this examination. It would take three months. It would be quite impossible. I am prepared to give evi-

dence in so far as my memory serves me, but have made no special effort to prepare. My objections already stated with regard to the production of the books apply equally to any evidence as to their contents. I don't remember when John Nicholson died. I have not sought within the last few days to ascertain. I don't remember whether the late John Nicholson had a personal account with the bank at the time of his death. The firm of McRae & Co. had an account at my bank at that time. I always understood that Nicholson was a partner in the firm of McRae & Co. I refuse to state the amount standing at the credit of McRae & Co. at that time. (Mr. Henderson states on behalf of McRae & Co. and on behalf of the executors that they have no objection to the information being given and would prefer that it should be given.) I cannot take cognizance of a verbal statement such as that just made, even when made in open Court, and I refuse to give the information. Notwithstanding Mr. Henderson's permission, I decline to give any information as to this account, as I do not know how far it may affect others. (Mr. Latchford asks that this be reported on specially by the Master.) I knew the late John Nicholson. Our bank had dealings with him for some time. Since his death the bank has received money from the Sault contract. I must decline to say how much. I decline to state how much we have received from the executors or Allan & Fleming. I don't know that we have received any from the executors. We have received amounts from Allan & Fleming, but I decline to say how much."

It was objected upon the motion that there was no authority to subpoena a witness for examination before the Master. This would be startling, if valid. If any Rule were required to give the Master jurisdiction, Rule 484, Consolidated Rules, 1897, is quite broad enough in terms to cover the case. (2) That the material served with the notice of motion was insufficient. I need not consider this except as will hereafter appear.

The main objection was upon the grounds stated by Mr. Anderson heretofore referred to. The first objection, that many of the books sought to be produced by the plaintiff were in constant daily use, is, I think, a tenable objection. I do not think it is reasonable to expect the bank manager to take from the bank the books that were in use and attend at ten o'clock in the morning, the beginning of banking hours, for the purpose of an examination in a matter in which he had no interest except as a witness. This objection, however, is of less value because, upon my suggestion during the argument, the case stood to enable counsel for the plaintiff to arrange for an appointment which would suit the convenience of Mr. Anderson, both as to time and place, it being understood at the argument that, if the local manager would assent to it, the examination might take place in the bank parlours after banking hours, say at four o'clock in the afternoon. This opportunity has been afforded the local manager, but he has declined to attend for the purpose of giving his evidence or producing the books at any time or place.

The second objection is, I think, not tenable. In the first place, it does not state that the local manager has been directed not to produce the books either on this or any other occasion; that is to say, it was not stated that there was either a specific or a general rule which he would violate if he did produce the books. And I am further of the opinion, following the line of thought of the learned Chancellor in *Re Dwight and Macklam*, 15 O. R. 148, that where, as here, the head office of the bank is outside of the Province, and the directors, president, and general manager are outside of the Province, the local manager is the one in charge and in custody of the books, and is the proper person to subpoena to produce them for the purpose of evidence. Indeed, any other rule would work the gravest inconvenience and would place obstacles in the way of administering justice that would be burdensome in the extreme. If it should turn out that my opinion is not well founded, the gentlemen having the direction of the bank will have to

consider the inconvenience that they may be put to for the purpose of making production; and it may be necessary to apply to Parliament for such legislation as will prevent the assertion of a right which in such a case seems to be purely technical, and the insistence upon which would work a substantial injustice.

I refer also to "Communication by Telegraph," by Gray, sec. 124, and the cases of *Ex p. Brown*, 7 Mo. App. 484, 494-500, and also *Ex p. Brown*, 72 Mo. 83-95.

The third objection is answered by the decision in *Re Dwight and Macclam*. It would be indeed a regrettable thing if any legislation would prevent the Courts from enforcing the giving of evidence relating to matters which concern suitors, and without which it would be difficult, if not impracticable, to determine the issues between them. Here the evidence sought is as to entries made of financial transactions in which the deceased was engaged; and surely his representatives have the right to know what moneys the bank received and what disposition was made of these moneys. The objection urged by the local manager to giving such evidence has less to support it in this case than in any other to which I have been referred, because all the parties interested in the account represented by counsel were not only willing but anxious that the evidence should be given and the facts stated to the Court. Indeed, I feel at some loss to know why the local manager took the ground that he did and maintained it with such pertinacity, amounting almost to perverseness. He having been sworn as a witness, I know of no rule of evidence which justified him in refusing to answer such questions as were put to him regarding the facts which were sought to be discovered. It might have been a tenable objection, if urged by any one of the parties to the litigation, that his recollection of what was in the books was not the best evidence, but that was not a matter which he as a witness had to do with. And if the counsel were prepared to take his recollection of the facts as they appeared in the books, it was quite improper in him to

object to state such facts, unless, indeed, he hesitated because he felt that his duty to the bank under the provisions of the statute required him to keep silence. I think it was his duty to answer such questions, and that his refusing to do so was a breach of duty that he owed to the parties and to the Court.

I think the objection taken, to which I have not as yet referred, that the subpoena was too broad and wide in its terms, was well taken, but that objection was not taken upon the examination of the witness, and I think has nothing of substance in it. All parties knew what in fact was required, and the witness by his formulated objections to giving evidence made it manifest that he was not in trouble by reason of any largeness or looseness of language in the subpoena. The case of *Lee v. Angas*, L. R. 2 Eq. 59, may be referred to.

I think the order that I should make is that the local manager attend, at such time and place as the Master may appoint, to give evidence as to the matters in issue between the parties concerning which he has knowledge, and to produce such books and papers as contain entries relating to such matters and as may be directed by the Master. The parties have a perfect right to inquire into all matters which affect their interests and their rights and of which record has been kept in the books of the bank. Of course no production can be required and no questions can be asked as to matters which are not pertinent to the issue and which affect the accounts of other people having no interest in this litigation.

I have no doubt that the Master, if the witness desire it, will give an appointment to take the evidence in the office of the bank, so that the books need not be removed from the bank building; and the appointment should be given for an hour that will not interfere with the ordinary business of the bank. The witness must attend to be examined at his own expense.

I give neither party any costs of this motion. Not the mover, because I think the subpoena was too large and the

hour named an inconvenient hour. Not the witness, because I think he has failed in sustaining the objections, which were raised, no doubt, in good faith, but which, in my opinion, should not have been raised, and he has refused to accede to the offers made to him to suit his convenience as to time and place of examination.

I do not make further reference to the authorities which are referred to in the judgment in *Re Dwight and Macklam*. It is sufficient to distinguish this case from the case of *Crowther v. Appleby*, L. R. 9 C. P. 23, and *Attorney-General v. Wilson*, 9 Sim. 526, to say, as I before have said, that it has not been made to appear that by producing these books the witness would have been contravening any rule or regulation of the bank, or any order placed upon him by his superiors, even if such a statement would have been a successful answer to this application, which I think it would not, for the reasons above given.

RE BERRYMAN.

Infant—Insurance Moneys—Payment into Court—Foreign Tutrix—Payment out—Trustee—60 Vict. ch. 36, secs. 155, 157 (O.)

The provisions of secs. 155 and 157 of the Ontario Insurance Act, 60 Vict. ch. 36, provide a special mode for dealing with the shares of infants in insurance moneys, and exclude the application of the ordinary rules of law so far as inconsistent therewith.

And therefore a tutrix of infants duly appointed in the Province of Quebec is not entitled *quâ tutrix* to moneys of the infants paid into Court under sec. 157 of the Act; but she may, under sec. 155, sub-sec. 2, be appointed a trustee of the fund and receive it, upon giving proper security.

[November 15, 1897.—*Meredith*, C.J.]

THIS was an application by the tutrix of two infants, appointed by the Superior Court of Saint Francis, in the Province of Quebec, for payment to her of the fund in Court to the credit of this matter.

The fund consisted of a sum of about \$1,000, paid into Court by the Sons of England Benefit Society, under the provisions of an order dated 16th September, 1897, made upon the application of the society, under sec. 157 of the Ontario Insurance Act, 60 Vict. ch. 36.

The application was heard by MEREDITH, C. J., in Chambers, on the 12th November, 1897.

W. E. Middleton, for the applicant.

F. W. Harcourt, for the official guardian.

Judgment was delivered on the 15th November, 1897.

MEREDITH, C. J.—By the law of Quebec the tutrix is entitled to demand and receive all the personal estate of the infants of whom she is tutrix, wherever the same may be, and it is her duty to reduce into her possession all such personal property.

Apart from the provisions of the statute to which I shall refer, it is settled by the case of *Hanrahan v. Hanrahan*, 19 O. R. 396, that these rights must be recognized and given effect to in this Province.

I am, however, of opinion that the provisions of the statute exclude the application of the rule laid down in that case.

By sec. 155, sub-sec. 1, of 60 Vict. ch. 36, the insured is empowered to appoint a trustee of the moneys payable under a policy; sub-sec. 2 provides that if no trustee is appointed to receive the shares to which infants are entitled, their shares may be paid to the executors of the insured, or to a guardian appointed by one of the Surrogate Courts of this Province or by the High Court, or to a trustee appointed by the High Court; sub-sec. 3 requires the guardian appointed under sub-sec. 2 to give security to the satisfaction of the Court for the faithful performance of his duty, and for the proper application of the money which he may receive; and by sec. 157 the insurance company is authorized, if there be no trustee, executor, or guardian competent to receive the share of

any infant (which must mean, competent under the provisions of the Act to which I have referred), to obtain an order for payment of the insurance money into Court.

These provisions, in my opinion, provide a special mode for dealing with the shares of infants in insurance moneys, and exclude the application of the ordinary rules of law, as far as they are inconsistent with them.

I must, therefore, refuse the application ; but I see no reason why I should not, if she desire that I should do so, appoint the applicant trustee of the fund under sec. 155, sub-sec. 2, and direct payment of it to her as such trustee, upon her giving security for the faithful performance of her duty as trustee and for the proper application of the fund : see *Re Thin*, 10 P. R. 490 ; *Re Slosson*, 15 P. R. 156 : and such an order may issue.

GALLAGHER V. GALLAGHER.

Costs—Alimony—Disbursements—Prospective Counsel Fee—Solicitor—Rule 1144.

Rule 1144 does not warrant the making of an order for payment by defendant to plaintiff's solicitors in an alimony action, of a sum to cover counsel fees, unless it is shewn that the fees are to be paid to counsel who is not the solicitor for the plaintiff or the partner of the solicitor.

[November 19, 1897.—*Meredith*, C.J.]

AN appeal by the defendant from an order of the local Judge at Hamilton, under Con. Rule 1144, for payment by the defendant to the plaintiff's solicitor in an action for alimony of interim disbursements. The appeal was upon the ground that a prospective counsel fee was improperly allowed.

The appeal was argued before MEREDITH, C. J., in Chambers, on the 13th September and 12th November, 1897.

J. Bicknell, for the defendant.

W. E. Middleton, for the plaintiff.

Haffey v. Haffey, 7 P. R. 137; *Ingram v. Ingram*, 10 P. R. 569; *Magurn v. Magurn*, *ib.* 570; *Bradley v. Bradley*, *ib.* 571; *Lalonde v. Lalonde*, 11 P. R. 143; *Knapp v. Knapp*, 12 P. R. 105, were referred to.

Rule 1144 is as follows: "An application for costs, in an alimony action, shall not be made until the time for delivering the defence has expired, and costs shall not be ordered to be paid *de die in diem* by the defendant, but only the amount of the cash disbursements actually and properly made by the plaintiff's solicitor."

Judgment was delivered on the 19th November, 1897.

MEREDITH, C. J.—This is an appeal by the defendant from an order made under Con. Rule 1144 by the local Judge at Hamilton in an action for alimony, and the point raised is as to the right of the plaintiff to have allowed and paid to her a sum to cover a fee to counsel with brief at the trial, where it is not shewn on the application that it is intended to retain counsel other than the plaintiff's solicitor or his partner for the purposes of the trial.

When the appeal came on to be argued, I directed the argument to stand over in order that a report might be got from the senior taxing officer as to the practice which has obtained since the passing of the Act, the provisions of which are now contained in the Rule.

That report has now been obtained, and I have procured from the Master in Chambers a certificate as to the practice which he has followed in dealing with applications under the Rule.

Both officers report that the practice is not to make an order for the payment of prospective cash disbursements for counsel fees unless the applicant shews by affidavit that counsel other than her solicitor or his partner is to be retained.

Assuming the Rule to be applicable to prospective disbursements, I am unable to see how a sum of money which

is not to be disbursed by the solicitor—and that is the case where the counsel fee is payable to the solicitor or his partner—can be said to be a “cash disbursement actually and properly made by the plaintiff’s solicitor.” I agree with the Master in Chambers and the taxing officer that the Rule does not warrant the making of an order for payment of a sum to cover counsel fees, unless it is shewn that the fees are to be paid to counsel who is not the solicitor for the plaintiff or the partner of the solicitor; and I think that the practice which has prevailed under the Rule is the proper practice, and one which accords with the policy which originally dictated the legislation on the subject.

The appeal must, therefore, be allowed, and the order of the learned local Judge varied by deducting from the sum ordered to be paid the amount included for the counsel fee.

There will be no costs of the appeal to either party.

EASTWOOD V. HENDERSON ET AL.

Costs—Libel—Apology—Satisfaction—Trial of Question of Costs—Application at Chambers.

After action for libel brought, the defendants published a retraction and apology, which was accepted as satisfactory by the plaintiff. The defendants declined to pay the plaintiff's costs up to that time, and the plaintiff proceeded to trial:—

Held, MEREDITH, C. J., dissenting, that either party could, after the publication of the apology and its acceptance by the plaintiff, have moved in Chambers to have the question of costs disposed of; but, neither party having moved, that the plaintiff should have such costs only as he would have been entitled to had he so moved, and that the defendants should have no costs.

Knickerbocker v. Ratz, 16 P. R. 191, followed.

Judgment of ARMOUR, C. J., varied.

[November 20, 1897.—*Divisional Court.*]

MOTION by the plaintiff to set aside the judgment of ARMOUR, C. J., and to enter judgment for the plaintiff for nominal damages and for the costs of the action, under the circumstances set forth in the opinion of MACMAHON, J.

The motion was argued before a Divisional Court composed of MEREDITH, C. J., ROSE and MACMAHON, JJ., on the 14th April, 1897.

Wallace Nesbitt and *R. L. Johnston*, for the plaintiff.

Farewell, Q. C., for the defendants.

Judgment was delivered on the 20th November, 1897.

MACMAHON, J.—The action is for the publication on the 27th March, 1896, in a newspaper called "The Chronicle," (a weekly paper published at the town of Whitby, and owned by the defendants), of a libel charging the plaintiff, a physician, with conspiring with one Alger to defraud a certain life insurance company.

Notice of action was served on the 18th April. On the 24th April the defendants inserted in "The Chronicle" what they considered an apology. On the 29th April the solicitors for the plaintiff wrote the defendants declining to regard what they called the apology as a full and complete retraction, and pointing out that in the alleged

apology the defendants state they never charged the plaintiff with intending to commit a fraud, which they (plaintiff's solicitors) assert is a positive contradiction of the former statement against Dr. Eastwood as to his connection with the insurance frauds. And the plaintiff's solicitors insisted on such a complete retraction being published as would vindicate Dr. Eastwood's character, and that, in the event of their declining to do this in the next issue of "The Chronicle," the action would be proceeded with. On the following day (the 20th April) the defendants wrote saying they desired to consult their solicitor, Mr. Dow, who was then absent in Ottawa, and, as "The Chronicle" was going to press that afternoon, they would be unable to publish anything in reference to the matter that week. On the 7th May the defendants, through Dow & McGillivray, their solicitors, wrote requesting the plaintiff's solicitors to write what they thought "should be inserted in 'The Chronicle,' so that we may see exactly how far you think the article can justly be complained of, and in that way we shall find out whether there is any chance of our arriving at a satisfactory arrangement of the matter." To this the plaintiff's solicitors replied on the 8th May stating that in their letter of the 29th April to the defendants they had pointed out the objectionable features of the first article, and also wherein the alleged apology was insufficient, and that to any ordinary reader their complaint was perfectly intelligible; and also reiterating that what was desired was a full and complete retraction, and, "that not being forthcoming, we suppose the only alternative now is to let proceedings go on."

The writ was issued on the 13th May, and served on the same day, and on the 16th May the defendants published in "The Chronicle" a retraction, which the plaintiff's solicitors on the 18th May informed the defendants' solicitors they regarded as an ample apology, and that upon payment of the costs they would discontinue the action.

On the refusal of the defendants to pay the costs, the plaintiff's solicitors on the 9th June filed and served a state-

ment of claim. The defendants in their statement of defence set up that the words complained of by the plaintiff were fair and *bonâ fide* comment on the facts given in evidence on the trial of criminal proceedings instituted by the Crown against George E. Alger, Henry Trull, and Charles H. Francey, and were printed and published by the defendants *bonâ fide* and without malice and for the public benefit; and that the defendants on the 24th April published in "The Chronicle" a full and fair retraction of any statements alleged to be erroneous; and also that in the issue of "The Chronicle" of the 16th May the defendants inserted "a full and fair retraction of and apology for any statements alleged to be erroneous in the article complained of, and the plaintiff through his solicitors accepted the same as sufficient and satisfactory, and the only matter now involved in this action is a question of costs."

The action was tried at Whitby, before Armour, C. J., on the 17th November, 1896.

The jury was dispensed with by consent, and the learned Chief Justice, after hearing the evidence, reserved judgment, and on the 8th January, 1897, indorsed on the record the following judgment: "I direct that judgment be entered in this cause, after thirty days from this date, for the plaintiff against the defendants for the costs of this action up to the 18th day of May, 1896; and for the defendants against the plaintiff for the costs of this action subsequent to the 18th day of May, 1896; and that the costs shall be set off, and the party against whom the balance is found shall pay such balance."

The plaintiff moves to set aside the judgment so directed to be entered, and to enter judgment for the plaintiff for nominal damages and for the costs of the action.

After action brought, the plaintiff's claim was satisfied by the publication of a retraction and apology, which was satisfactory to him, and, had the defendants submitted to the payment of the plaintiff's costs, the plaintiff could not have proceeded with his action except at the peril of being

deprived of the extra costs of proceeding to trial, and probably of paying any extra costs of going to trial.

In *Sivell v. Abraham*, 8 Beav. 598 (1846), Lord Langdale, M. R., said: "It is perfectly well established, that where a defendant submits to the whole demand of the plaintiff, and to pay the costs, he has a right, at once, to stop all further proceedings." The head-note to *Morgan v. Great Eastern R. W. Co.*, 1 H. & M. 78 (1863), is: "On a defendant submitting to plaintiff's demands, the plaintiff ought not to bring the cause to a hearing without first applying for defendant's consent to have the costs disposed of on motion." And Wood, V.-C., in his judgment said: "The practice seems to be this:—According to *Sivell v. Abraham*, a plaintiff * * is bound to make an application to the defendant to have the costs disposed of on motion, and, unless he does so, is precluded from having the extra costs occasioned by going on to a hearing." And in *Sonnenschein v. Barnard*, 57 L. T. N. S. 712 (1887), the practice in *Sivell v. Abraham* received further confirmation, the Court holding that where, upon an interlocutory motion in an action, the plaintiff obtains the relief which he seeks, he is bound to make an application to the defendant to have the costs disposed of on motion, and unless he does so is precluded from having the extra costs occasioned by going on to trial. But if the defendant refuses to allow the matter to be disposed of on motion, the case cannot be so dealt with. This was the practice followed by the Referee in Chambers in *Webb v. McArthur*, 3 Ch. Chamb. R. 364.

But in *Knickerbocker v. Ratz*, 16 P. R. 191, Osler, J. A., on the authority of *North v. Great Northern R. W. Co.*, 2 Giff. 64 (1860), and *Tompson v. Knights*, 7 Jur. N. S. 704 (1861), held that the jurisdiction of the Master in Chambers to dispose of the question of costs did not necessarily depend upon consent of the parties to go before him. The defendants were, therefore, at liberty to apply at any time to have the costs disposed of in Chambers.

In their letter of the 23rd May the defendants' solicitors

say: "Our clients are unwilling to pay any costs. If you see fit to proceed, in view of the circumstances and what has been done, we beg to say we will read this letter in answer to any further proceedings you may take." This was a clear intimation that the defendants did not intend to pay any costs unless they were forced to. But, under the practice which our Court of Appeal has decided to be proper, the plaintiff might, and should, have applied in Chambers to have the question of costs disposed of. The defendants should have no costs, as they also might have moved to have the costs disposed of in Chambers.

I think the judgment should be varied by striking out that part thereof which directs that the costs of the action subsequent to the 18th day of May, 1896, be paid by the plaintiff to the defendants. The plaintiff should have such costs as and no more than if he had moved in Chambers. There will be no costs of this motion to either party.

ROSE, J.—I agree to what my learned brother MacMahon has said.

It seems to me that, reading the letters of May 18th, 22nd, and 26th, it is reasonably clear that the only question between the parties was one of costs, and that the action proceeded to trial to have that question determined.

MEREDITH, C. J.—I have the misfortune to differ from my learned brothers as to the proper disposition to be made of this appeal, and, as the question raised involves an important point of practice, it is, I think, proper that I should state my reasons for so differing.

If, as my learned brothers think, this case be governed by *Knickerbocker v. Ratz*, 16 P. R. 191, and the decisions referred to by Mr. Justice Osler in delivering the judgment of the Court of Appeal in that case, it must be on the ground that the defendants had conceded the relief claimed by the plaintiff, or, as put in *Tompson v. Knights*, 7 Jur. N. S. 704, that since the commencement of the action the object of the suit had been substantially attained; and if

that be so, as I understand the cases, the plaintiff should have applied in Chambers to stay further proceedings and for an order for the payment by the defendants of his costs, if he claimed to be entitled to his costs from the defendants; and it would, therefore, seem to follow that, not having done so, but having proceeded to the trial of the action, the learned Chief Justice was right in dealing with the costs in the manner in which he has dealt with them.

I do not understand that the refusal of the defendants to pay the costs justified the plaintiff bringing the action down to trial, or discharged him from the duty of applying to the defendants for their consent to have the question of costs disposed of in Chambers, if he claimed to be entitled to his costs: *Snow's Annual Practice*, 1897, p. 1168, and cases there cited; *Morgan v. Great Eastern R. W. Co.*, 1 H. & M. 78.

The cases of *Wilde v. Wilde*, 4 DeG. F. & J. 348, *Sonnenschein v. Barnard*, 57 L. T. N. S. 712, and *Tanqueray v. Bowles*, L. R. 14 Eq. 151, shew that the right to have the question of costs disposed of in Chambers depends on consent.

I doubt, however, whether *Knickerbocker v. Ratz* applies. The plaintiff, it is true, expressed his satisfaction with the apology which the defendants made after action, but he was willing to accept it, and put an end to the action, as I understand, only on condition that the defendants should pay the costs of the action, which they refused to do. Such a state of facts is, I think, widely different from that which existed in *Knickerbocker v. Ratz*. In that case the plaintiff claimed damages for the infringement of a patent and an injunction to restrain further infringement; the defendant paid into Court \$10 in satisfaction of the damages which the plaintiff accepted, and he offered to give his covenant not to infringe in the future, which the plaintiff accepted in lieu of an injunction, so that the case stood as if the defendant had submitted to the injunction being granted and to pay the damages claimed; but in this case the action was brought to recover damages for

the publication of the libel, and it would have been like the other case if the defendant had offered to pay a sum in satisfaction of the damages, which the plaintiff had accepted; that the defendant did not do, but offered to retract the libel, and the plaintiff agreed to forego his claim to damages and to accept the retraction on condition that the defendants would pay the costs of the action, and when the defendants refused to assent to that condition, I do not see why the plaintiff was not entitled to proceed with his action as if the negotiations had not taken place. In my opinion, the plaintiff was entitled to proceed as he did, and was entitled to his costs if there were not circumstances in the case which would have warranted the Judge at the trial, in the exercise of his discretion, refusing him his costs, and that the learned Chief Justice, with whom I have conferred, tells me he would have done had he not taken the view which he took as to the application of *Knickerbocker v. Ratz*.

The action was not, I think, a meritorious one, and the conduct of the plaintiff in reference to the transactions which the defendants were commenting on in the article which constituted the alleged libel was open to very severe animadversion; and that was not all; the conduct of his solicitors in refusing, before the litigation began and when the subject of an apology was being discussed between them and the defendants' solicitors, and after one apology had been published which was not satisfactory to them, the request of the defendants' solicitors to point out specifically what was complained of in the article in order that the defendants might endeavour to meet their wishes, was, I think, unreasonable, and was the real cause of the litigation. These circumstances, I think, would have fully warranted the learned Chief Justice refusing to give the plaintiff his costs, and if my opinion were to prevail, the judgment pronounced by him would be varied by directing judgment to be entered for the plaintiff for twenty cents damages without costs, and there would be no costs to either party of the appeal.

GOSSLING V. M'BRIDE.

Arrest—Ca. sa.—Discharge.

Where a debtor is in custody under a writ of *ca. sa.*, the Court cannot make an order for his discharge except under the Indigent Debtors' Act.

[October 15, 1897.—*Divisional Court.*]

AN application by the defendant, in an action for seduction, for an order for his discharge from custody under a writ of *ca. sa.*, or for an order setting aside the order for the issue of the writ and all subsequent proceedings, upon the grounds: (1) that the defendant had no intention of quitting Ontario; and (2) that there was no return by the sheriff to the writ of *fi. fa.* issued upon the judgment.

The application was made in the first instance to a Judge in Chambers, who referred it, subject to all objections, to a Divisional Court, and it was heard by ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., on the 15th October, 1897.

G. W. Lount, for the applicant.

D. Armour, for the plaintiff.

R. S. O. ch. 67 and the Rules relating to bailable proceedings, Con. Rules (1897) 1021 *et seq.*, were referred to.

The motion to set aside the order was not pressed, in view of *Damer v. Busby*, 5 P. R. 366, and *Gilbert v. Stiles*, 13 P. R. 121.

THE COURT held that an application for discharge under Rule 1047 does not lie where the arrest was under a *ca. sa.*: *Kidd v. O'Connor*, 43 U. C. R. 193: and the defendant's only remedy was by application under the Indigent Debtors' Act, R. S. O. ch. 68.

DICKERSON ET AL. V. RADCLIFFE ET AL.

Discovery—Patent of Invention—Action to Restrain Infringement—Denial of Right—Details of Business Transactions.

In an action to restrain the defendants from selling a certain drug in violation of the rights of the plaintiffs under a patent, and of the terms upon which the drug was sold to the defendants, and for damages for selling in violation of such rights and terms, and for damages for a trade-libel, the defendants admitted that they bought the drug, but not from the plaintiffs, and were selling it by their agents, and upon their examination for discovery stated fully their mode of procedure in buying and selling, but in their pleading they denied the plaintiffs' patent right:—

Held, that, there being a *bonâ fide* contest as to that right, the defendants should not, before the trial, be compelled to afford discovery of the details and particulars of such buying and selling, so as to disclose their and their customers' private business transactions. Such discovery should be deferred until after the plaintiffs should have established their right, even if a subsequent separate trial of the question of infringement should be necessary.

[October 30, 1897.—*Meredith*, J.]

AN appeal by the plaintiffs from an order of Mr. Cartwright, an official referee, sitting for and at the request of the Master in Chambers, dismissing an application of the plaintiffs for an order striking out the defence for the refusal of one of the defendants to answer questions put to him upon his examination for discovery, and for an order requiring the defendants to file a further and better affidavit on production of documents, and for an order requiring production especially of the books, papers, and documents which the defendants by their affidavit on production objected to produce.

The action was brought to restrain the defendants from selling a drug called "phenacetin," in violation of the rights of the plaintiffs under a certain patent, and in violation of the terms upon which the drug was sold to the defendants, and also for damages for selling in violation of such rights and terms, and for damages for a trade-libel. See a report of a previous motion in the action, *ante* 418. The defence was a specific denial. Issue was joined thereon.

By their affidavit of documents the defendants objected to produce their cash book, journal, ledger, order book, letter book, and letter file containing letters or orders for the drug; and the defendant who was examined declined to answer questions relating to the details of their buying and selling the drug in question.

The appeal was heard by MEREDITH, J., in Chambers, on the 18th October, 1897.

J. Bicknell, for the plaintiffs.

J. B. Holden, for the defendants.

The following cases were referred to: *Lister v. Norton*, 2 Pat. Cas. 68; *Rawes v. Chance*, 7 Pat. Cas. 275; *Fennessy v. Clark*, 37 Ch. D. 184; *Hurst v. Barber*, 12 P. R. 467; *Graham v. Temperance and General Life Assurance Co.*, 16 P. R. 536; *Comstock v. Harris*, 12 P. R. 17; *Mack v. Dobie*, 14 P. R. 465.

Judgment was delivered on the 30th October, 1897.

MEREDITH, J.—I think the learned referee had a right to refuse to compel the defendants to make—at this stage of the case—the disclosures sought; and that, in refusing, he did not unwisely exercise his discretion.

The defendant examined stated fully the defendants' mode of procedure in buying and in selling the drug in question. What is sought further from this defendant and from the documents in question are merely details and particulars of such buying and selling: facts some of which will be material upon the question of damages, if the plaintiffs succeed in the action, but otherwise not absolutely necessary for the trial of the action, in view of what the defendants have admitted. The admissions, shortly stated, are that the defendants bought the drug in Germany, but not from the plaintiffs or either of them; and that the defendants have advertised it for sale, and have sold it, through their agents travelling or residing in the United States of America, to persons in that country.

However the plaintiffs' case is looked at, the defendants' books and papers, and the details of their business and their own and their customers' affairs, should not, I think, be further laid bare before the plaintiffs and upon the proceedings of the Court, until the plaintiffs have established the right they claim and which the defendants deny—that is, their alleged patent right. There is a *bond fide* contest as to that right; if the plaintiffs have it not, or fail to prove it, the action fails in all main respects, and what may be a serious injury and wrong may be done if the defendants are now compelled to disclose their and their customers' private business transactions. Against this there can be urged only the possible inconvenience of a postponement of the trial in the event of the plaintiffs establishing their alleged right, and really needing further discovery before proceeding with the trial of the question of infringement—a thing very improbable, in view of the admissions of the defendants. The discovery sought has no bearing, of course, upon the question of the validity of the patent.

Some of the cases seem to go so far as to lay it down as a general rule that that possible wrong is not to be done, even though the inconvenience of a postponement of the trial, and consequently a separate trial of the questions of right and of infringement, will follow if the right be established. That is to say, the protection of the possible rights of parties is more important than the prevention of the possible inconvenience of two trials instead of one—a thing, to my mind, very clear, and unquestionably right.

But in this case, in view of the admissions made, any need for a postponement of the trial to obtain further discovery on the question of infringement seems to me highly improbable; and the question of damages or profits is one usually referred to a Master and dealt with in his office.

The appeal will therefore be dismissed; and the costs of it will be costs in the action to the defendants.

I refer to *Schreiber v. Heymann*, 63 L. J. N. S. Q. B.

749 ; *Benno Jaffe v. Richardson*, 68 L. T. N. S. 404 ; and *Badische Anilin Fabrik v. Johnson*, [1897] 2 Ch. 322—in addition to the cases cited.

The fact that the plaintiffs are suing for libel, and for what, I suppose, should be called breach of contract, should make no difference ; the substantial claim is for infringement of patent rights, and a recovery in that respect would cover all the damages they may have suffered in the other respects. The claim for breach of a condition of purchase seems like a make-weight, or adding another string to the plaintiffs' bow, and ought not to enable the plaintiffs to have indirectly that to which they are not, in my judgment, directly entitled.

END OF VOL. XVII.

A DIGEST

OF

ALL THE REPORTED PRACTICE CASES

CONTAINED IN THIS VOLUME.

ACCOUNT.

Master's Office — Verification — Affidavit—Vouchers — Cross-examination — Notice — Re-opening Account.—The person bringing into the Master's office an account, verified by affidavit, is obliged to vouch the payment of the amounts included in it, and is liable to cross-examination upon his affidavit, notice being first given him of the items upon which it is proposed that he shall be cross-examined.

Where no such notice was given, and the executor was not cross-examined, although ample opportunity was offered for the purpose, and the accounts were in no way objected to until the reference had been closed so far as the evidence was concerned, the Master properly considered that the affidavit verifying the accounts under Rule 63 and the vouchers had sufficiently proved the accounts.

Wormsley v. Sturt, 22 Beav. 398; *Re Lord*, L. R. 2 Eq. 605; *McArthur v. Dudgeon*, L. R. 15 Eq. 102; *Meacham v. Cooper*, L. R. 16 Eq. 102; *Bates v. Eley*, 1 Ch. D. 473, followed.

Upon an application to re-open an account of \$55,129.54, comprised in

upwards of 1,600 items of disbursements, one or two items were pointed out as appearing *prima facie* to be of such a character as might have been objected to:—

Held, not sufficient to justify opening up the whole account, especially in view of other facts appearing. *Re Curry, Curry v. Curry*, 379.

See ADMINISTRATION, 2.

ACTION.

1. *Settlement of—Dispute—Summary Trial—Stay of Proceedings—Costs.*—The Court has jurisdiction to stay proceedings in any action which has been compromised, where no terms of the compromise go beyond what is in controversy in the action.

And where, in an action of slander, the plaintiff excused his non-prosecution by alleging that an agreement had been entered into between himself and the defendant by which the action was to be dropped and \$10 costs to be paid by the defendant, which agreement was denied by the defendant, an order was made directing a summary trial, or the trial by an issue upon oral evidence, of the

question of the validity of the settlement; if the result should be a valid settlement, proceedings to be stayed perpetually and costs paid by defendant; if settlement invalid, action to be dismissed with costs to defendant. *Rees v. Carruthers*, 51.

2. *Stay of—Jurisdiction—Application of Stranger—Judicature Act, 1895, sec. 52 (9).*]—The jurisdiction to stay proceedings given by sec. 52 (9) of the Judicature Act, 1895, at the instance of any person, whether a party to the action or not, is only to be exercised where the action is an improper one, or where under the former practice the Court of Chancery might have enjoined its prosecution, and only where the stranger is one who seeks to intervene and can properly be added as a party. *Fawkes v. Griffin et al.*, 473.

3. *Dismissal — Default — Rules 434, 542.*]—Rule 434 provides that “in actions in the county of York, to be tried without a jury, if the plaintiff does not set down the action for trial within six weeks after the pleadings are closed and proceed to trial as provided in Rule 542, the action may be dismissed for want of prosecution” :—

Held, that unless there is default both in setting down and in proceeding to trial, an action cannot be dismissed. *Toronto Type Foundry Co. v. Tuckett*, 538.

ADMINISTRATION.

1. *Order—Executor—Reference—Conduct of—Parties.*]—An accounting party should not have the car-

riage of the proceedings in the Master's office, especially where there is a competition between an executor and beneficiaries as to who should be first in obtaining an administration order.

Such an order, obtained *ex parte* on the application of an executor, was varied by giving the conduct of the reference to two of the legatees, where the Judge had not been referred to the course of practice, and so had exercised no discretion to prevent the interference of the Court.

The order should not have been made without notice to the legatees, who were named as parties defendant in the proceedings taken by the executor. *Re Curry, Curry v. Curry et al.*, 69.

2. *Summary Order — Executors and Administrators — Account.*]—More than a year after the grant of the probate to the sole executrix named in the will of the testator, three legatees applied summarily for an administration order, upon the ground that the executrix, who for several years before the death of the testator had managed his business affairs, had refused to account for her dealings with his moneys, and now claimed an allowance from the estate for her services before the death and as executrix, denying that any sum was due by her to the estate :—

Held, that the legatees were entitled to the usual administration order, under which the Master could make all the necessary inquiries; and were not driven to an action for administration. *Re Bagwell—Anderson v. Henderson*, 100.

See RECEIVER, 1, 3, 4.

AFFIDAVIT.

Notary—Seal.—An affidavit for use in the Court, sworn before a notary public in Ontario, should be authenticated by his official seal. *Boyd v. Spriggins*, 331.

See ACCOUNT—APPEAL, 8—PARTIES, 7.

AFFIDAVIT OF EXECUTION.

See APPEAL BOND, 1.

AFFIDAVIT OF JUSTIFICATION.

See APPEAL BOND, 1.

ALIMONY.

See COSTS, ETC., 20 — WRIT OF SUMMONS, 2.

AMENDMENT.

1. *Pleading—Bills of Sale Act—Chattel Mortgage.*—Decision of the Queen's Bench Division, 16 P. R. 544, affirmed on appeal. *Williams v. Leonard et al.*, 73.

2. *New Defence—Court of Appeal.*—The defendants were sued as common carriers for breach of contract to carry and deliver safely the plaintiffs' goods, and in the alternative, if the defendants had become warehousemen of the goods, for their loss and destruction by fire, caused by the defendants' negligence. The defendants denied the contract, and averred that the goods were safely carried to their destination, but that

the plaintiffs left them in the defendants' hands at their own risk, and, if they were destroyed, it was without any negligence on the defendants' part. The only question at the trial was whether the fire was caused by the negligence of the defendants, and this, on the evidence, was found against them by the trial Judge. On appeal to the Court of Appeal the defendants for the first time sought to defend under the special conditions on the bills of lading, by which, it was contended, they were exempted from liability for loss by negligence in the character of bailees or warehousemen, and for loss by fire:—

Held, that the very right and justice of the case did not require the Court to permit the defendants to raise the new defence by amendment.

Browne v. Dunn, 6 R. 67, applied and followed. *Sales et al. v. Lake Erie and Detroit River Railway Company*, 224.

3. *Adding Plaintiff—Attorney-General—Final Judgment.*—A motion made by the plaintiffs after the judgment of this Court, 23 A. R. 566, for leave to amend by adding the Attorney-General as a party plaintiff in order to meet the difficulty raised by the judgment that the plaintiffs had no *locus standi*, was refused, upon the ground that such an amendment could not be made after final judgment. *Johnston et al. v. Consumers' Gas Company of Toronto*, 297.

4. *Order of Court—Accidental Slip or Omission—Rules 536, 780—Carelessness—Delay—Terms.*—One of several defendants in ejectment by a mortgagee disclaimed title and denied possession, and the plaintiff's action was dismissed at the

trial. A Divisional Court reversed the decision at the trial, and ordered judgment to be entered for the plaintiff with all costs, the disclaiming defendant not appearing on the argument, although duly notified and served with the minutes of the order, upon which judgment was entered and execution issued :—

Held, upon a motion to amend or vary the order as to costs, made after some months' delay, that the Court, being satisfied that his defence was made out at the trial, in the exercise of its inherent powers over its records or the powers conferred by Rule 780, could now correct an error arising from an accidental slip or omission in its order, and make the order as to the applicant's costs which would have been made originally :—

Held, also, that he was entitled to relief under Rule 536, as amended by Rule 1454, as a party who, through mistake, had not been represented upon the argument of the appeal :—

Held, also, that the carelessness and delay of the applicant did not disentitle him to relief, though they afforded ground for imposing upon him the terms set out in the judgment. *Cousins v. Cronk et al.*, 348.

5. *Statement of Claim—Writ of Summons—Service out of Jurisdiction—Adding New Claim—Limitation of Actions—Terms.*—Where a writ of summons in an action for a specified cause has been issued and served upon defendants out of the jurisdiction, with a statement of claim, pursuant to an order under Rule 271 (1309), and the defendants have appeared, an order may properly be made allowing the plaintiffs to amend the statement of claim by adding a new claim for an entirely

different cause of action, provided that it is a claim in respect of which leave to serve process out of the jurisdiction might have been obtained.

Holland v. Leslie, [1894] 2 Q. B. 346, 450, followed.

Held, also, that the plaintiffs should, in respect of the Statute of Limitations running against their added claim, be placed in the same position as if their action for the added claim had been brought at the date of the amendment. *Hogaboom et al. v. MacCulloch et al.*, 377.

6. *Pleading—New Case Made at the Trial—Statute of Frauds.*—In an action by a lessor against an assignee of the lease, brought after the expiry of the lease, to recover possession of the demised premises, and for cancellation of the lease, and for relief from any claim of the defendant for renewal under a covenant in that behalf, the defendant set up in his defence the covenant to renew, and alleged that he and the plaintiff had never been able to agree upon a new rent, but that he had always been ready and willing to have it fixed by arbitration, as required by the lease, and had, since action, notified the plaintiff of the appointment of an arbitrator. In reply the plaintiff alleged that the defendant had made a written offer to renew at a named rental; that the plaintiff had accepted the offer; but that the defendant had not carried out the arrangement so made. There was no further pleading. At the trial the evidence shewed a written offer made by the defendant, but only a conditional acceptance by the plaintiff, who, however, gave uncontradicted evidence of a subsequent verbal renewal by the defendant and acceptance by the plaintiff

of the terms of the former written offer :—

Held, FALCONBRIDGE, J., dissenting, that by the conditional acceptance of the written offer, it was in effect refused, and had ceased to exist when the subsequent verbal agreement was made; it was not necessary for the defendant to plead the Statute of Frauds in rejoinder to the reply, as he was able to shew that his offer had been refused; and when the plaintiff was allowed at the trial to give evidence of a subsequent renewal by parol of the terms of the lapsed written offer, the defendant should have been allowed to set up the Statute of Frauds; upon which he was entitled to succeed.

Judgment of MEREDITH, C.J., reversed. Affirmed on appeal. *Elmsley et al. v. Harrison et al.*, 425, 525.

7. *Pleading — New Defence — Statute of Limitations.*]—The defendants obtained leave to amend their statement of defence by setting up the Statute of Limitations as an additional defence in an action for waste brought by the plaintiffs as owners of the remainder in fee in certain lands of which the defendants were tenants for the lives of others:—

Held, following *Williams v. Leonard*, 16 P. R. 544, 17 P. R. 73, that the Statute of Limitations being a defence permitted by law, and the real question between the parties being as to the right of the plaintiffs to recover by action the damages claimed by them, “the very right and justice of the case” demanded that the plaintiffs should not recover in this action if the statute afforded a bar to their right to do so.

Brigham v. Smith, 3 Ch. Chamb. R. 313, referred to, however, as laying down a more reasonable and

just practice. *Patterson et al. v. Central Canada Savings and Loan Company*, 470.

See APPEAL, 10—COSTS, ETC., 22
—JUDGMENT, 9, 10—PARTIES, 1, 7.

APOLOGY.

See COSTS, ETC., 21.

APPEAL.

1. *Divisional Court — Railway Act — Order of Judge — Persona Designata.*]—A Judge making an order under sec. 165 of the Dominion Railway Act, 51 Vict. ch 29, for payment out of Court of compensation moneys, acts, not for the Court, but as *persona designata* by the statute; and no appeal to a Divisional Court lies from his order.

Canadian Pacific R. W. Co. v. Little Seminary of Ste. Thérèse, 16 S. C. R. 606, followed. *Re Toronto, Hamilton, and Buffalo Railway Company and Hendrie et al.*, 199.

2. *Master's Certificate—Divisional Court.*]—An appeal does not lie to a Divisional Court from the decision of a Judge in Court upon an appeal from a Master's report.

The certificate of a Master is a report, and is subject to the same rules as to appeal as an ordinary report. *Re Molphy, Beckes v. Tiernan*, 247.

3. *Court of Appeal—Judgment on Preliminary Issue—Order of Divisional Court — Leave to Appeal — Judicature Act, 1895, secs. 72, 73.*]—An appeal lies to the Court of Appeal, without leave, from the judgment upon the trial of a preli-

minary issue directed by an order in Chambers; but leave is necessary for an appeal from an order of a Divisional Court affirming an order in Chambers, where the appellant is the same party who appealed to the Divisional Court, and the order appealed from was pronounced after, although the appeal was taken and heard before, the coming into force of the Act of 1895.

Construction of secs. 72 and 73 (as amended) of the Judicature Act, 1895. *Graham v. Temperance and General Life Assurance Company of North America*, 271.

4. *Court of Appeal—Order of Divisional Court Affirming Chambers Orders—Judicature Act, 1895, secs. 72, 73—Leave to Appeal—Special Circumstances—Terms.*—An appeal lies to the Court of Appeal from an order of a Divisional Court dismissing an appeal from an order of a Judge in Chambers dismissing an appeal from an order of the Master in Chambers dismissing a motion to set aside judgment by default of defence in an action for the recovery of land; but only upon leave to appeal being obtained.

Construction of secs. 72 and 73 (as amended) of the Judicature Act, 1895.

And leave to appeal was granted, where the omission to file the defence was a mere slip of the solicitor; the application for relief was made promptly; and it appeared that in a previous action the Court had stayed proceedings under the power of sale contained in the mortgage upon which this action was brought, and had required an action of ejectment to be brought.

Terms of payment of costs and security for costs imposed. *Bourne et al. v. O'Donohoe*, 274.

5. *Court of Appeal—Cross-appeal—Notice—Rule 825—Time—Signing of Judgment—Rule 804—Extension of Time.*—In an action brought against three defendants for damages for pollution of a stream, judgment was given at the trial for the plaintiff against one defendant, and the action was dismissed against the other two:—

Held, that, upon the appeal of the first defendant to the Court of Appeal, the plaintiff, the respondent, could not maintain a cross-appeal against the other defendants by way of notice under Rule 825, but must proceed by way of an independent appeal.

Freed v. Orr, 6 A. R. 690, not followed.

Re Cavender's Trusts, 16 Ch. D. 270, followed.

Under Rule 804, the time for service of notice of appeal runs from the day on which the judgment appealed against is actually signed or entered, and not from the day upon which it is pronounced.

Time for giving notice of appeal extended where the party proposing to appeal had from the first shewn his intention to appeal, but had been under a misapprehension as to the practice, and no session of the Court had been lost. *Johnston v. Town of Petrolia et al.*, 332.

6. *Leave—Winding-up Act—Successive Applications—Special Circumstances—Terms.*—Orders having been made in the matter of the winding-up of an insolvent bank for payment of certain moneys out of Court to the executors of the purchaser from the liquidator of the assets, and the moneys having been paid out to them, the Receiver-General for Canada asserted a claim to such moneys under secs. 40 and

41 of the Winding-up Act, R. S. C. ch. 129, and, not having been a party to the applications for payment out made by the executors, presented a petition for payment over to him by them or repayment into Court of such moneys; or, in the alternative, for leave to appeal from such orders. This petition was dismissed, upon the ground that the petitioner was not entitled to complain, even if the moneys had been improperly paid out.

Upon an application by the petitioner for leave to appeal to the Court of Appeal from the order dismissing his petition:—

Held, that a Judge of the High Court had power to grant the leave sought, the application not being in effect a second application for leave to appeal from the orders for payment out.

And, under all the circumstances of the case, leave to appeal was granted, upon security for costs being furnished, the question being a new and important one and the amount involved considerable. *Re Central Bank of Canada*, 370.

7. *Leave—Order for Leave to Appeal.*—An order giving leave to appeal is an order from which an appeal does not lie; and therefore leave to appeal from such an order will not be granted.

Re Sarnia Oil Co., 15 P. R. 347, *Ex p. Stevenson*, [1892] 1 Q. B. 394, 609, and *Kay v. Briggs*, 22 Q. B. D. 343, followed. *Re Central Bank of Canada*, 395.

8. *Surrogate Court—Time—Security—Deposit of Cheque—Affidavit—R. S. O. ch. 50, sec. 33—Surrogate Rule 57.*—The plaintiffs, desiring to appeal to the Court of Appeal from an order of the Judge of a Surrogate

Court, made on the 4th October, 1895, served notice of appeal on the fifteenth day thereafter, and on the same day deposited with the registrar of the Surrogate Court as security an unmarked cheque on a bank for \$100, payable to the order of the registrar, who simply retained it in the office and never cashed it. No other security was given, and no affidavit of the amount of the property to be affected by the order was filed:—

Held, that what was done was not such a compliance with the requirements of Rule 57 of the Surrogate Rules of 1892 that the appeal was thereby lodged and brought within fifteen days, as required by sec. 33 of the Surrogate Courts Act, R. S. O. ch. 50; and the appeal was quashed with costs. *Re Wilson. — Trusts Corporation of Ontario v. Irvine*, 407.

9. *Time—Extension of—Special Circumstances—Terms.*—Where notice of appeal was given, but the appeal was not set down in due time, and a sittings of the Court had been lost, the time for setting down was extended; as it appeared that there had all along been a *bonâ fide* intention of appealing, that security had been given for a large part of the debt and costs, and a large sum paid for a copy of the evidence. The terms of giving further security, setting down the appeal within a limited time, and paying costs in any event, were imposed. *D'Ivry v. World Newspaper Company of Toronto et al.*, 543.

10. *Leave to Appeal—Grounds—Statutes—Law Courts Act, 1896—Amendment—Procedure—Pending Actions—Judgment not Entered.*—By paragraph 7 of the schedule to the Law Courts Act, 1896, sec. 73 of the Judicature Act, 1895, was

amended so as to enable a Divisional Court and the Court of Appeal, and any Judge thereof, to grant leave to appeal in cases where no absolute right to appeal exists, and where, under the law as it stood before the amendment, no such leave could have been obtained :—

Held, that, being a matter of procedure, it applied to pending actions.

Watton v. Watton, L. R. 1 P. & M. 227, followed.

2. That where at the time the amending statute was passed the judgment of the Court had been pronounced, but had not been entered up, the action was still pending.

Holland v. Fox, 3 E. & B. 977, and *In re Clagett's Estate*, 20 Ch. D. 637, followed.

Leave granted to appeal to the Court of Appeal from an order of a Divisional Court affirming, but on different grounds, the judgment at the trial dismissing the action, where no lapse of time had occurred to prejudice the plaintiff's claim to the consideration of the Court, the injury for which he sued being a serious one, and there being no authority upon the question of law decided by the Divisional Court. *Spence v. Grand Trunk R. W. Co. et al.*, 172.

See ARREST, 2—COSTS, ETC., 5, 8, 10, 13, 24, 25, 29, 34, 35, 38—JUDGMENT, 12—NOTICE OF TRIAL, 2—PARTIES, 1—PAYMENT INTO COURT—SOLICITOR AND CLIENT, 1, 2—VENUE, 2.

APPEAL BOND.

1. *Condition—Affidavit of Execution—Affidavit of Justification.*—The condition of a bond filed by the defendants as security for the costs of an appeal to the Supreme Court of Canada was that if the defendants

“shall effectually prosecute their said appeal and pay such costs and damages as may be awarded against them by the Supreme Court of Canada, then this obligation shall be void ; otherwise to remain in full force and effect :”—

Held, that the bond was not irregular.

2. The affidavit of execution of such a bond need not be entitled in the cause.

3. A surety in such a bond, when justifying in the sum sworn to “over and above what will pay all my just debts,” need not add “and every other sum for which I am now bail.” *Molsons Bank v. Cooper et al.*, 153.

2. *Supreme Court of Canada—Condition.*—The condition in a bond filed upon an appeal to the Supreme Court of Canada was to “pay such costs and damages as shall be awarded *in case the judgment shall be affirmed* :”—

Held, that this was not in substance the same as the statutory condition to “pay such costs and damages as may be awarded against the appellant by the Supreme Court ;” and the italicized words added a condition not required by the Supreme Court Act, and by which the respondents ought not to be hampered. *Davidson et al. v. Fraser et al.*, 246.

APPEARANCE.

See COSTS, ETC., 1—JUDGMENT, 4, 5, 11.

ARBITRATION AND AWARD.

Extending Time for Making Award—R. S. O. ch. 53, sec. 43—Voluntary Submission—Award already Made—“Good Cause.”—The Court has

jurisdiction under R. S. O. ch. 53, sec. 43, to enlarge the time for making an award upon voluntary submission, after the making of the award; and it is "good cause" for so enlarging that the arbitrators themselves, pursuant to their powers under the submission, did all they could to enlarge, but were unable at the time to get the original submission whereon to make the indorsement as to enlargement. *Re Clement and Dixon*, 455.

See COSTS, ETC., 34—REFEREE.

ARREST.

1. *Ca. Sa.—Discharge.*—Where a debtor is in custody under a writ of *ca. sa.*, the Court cannot make an order for his discharge except under the Indigent Debtors' Act. *Gosling v. McBride*, 585.

2. *Discharge—Order for—County Court—Appeal—Divisional Court—Rule 1051—Intent to Quit Ontario—Intent to Defraud Creditors.*—Upon an appeal by the plaintiff from an order of the Judge of a County Court, in an action in that Court, discharging the defendant from the custody of his bail, it was objected by the defendant that the order was not a final one, and that no appeal lay:—

Held, that the Court had, by Rule 1051, jurisdiction to discharge or vary the order, as explained in *Elliott v. McCuaig*, 13 P. R. 416.

Held, also, upon the evidence, that the defendant should not have been discharged from custody.

Toohey v. Frederick, 14 P. R. 287, not followed, having been in effect overruled by *Coffey v. Scane*, 22 A. R. 269.

Held, by the Court of Appeal, that no appeal lay, with or without leave, from the order of the Divisional Court. *McVeain v. Ridler*, 353.

ASSIGNMENT OF RENT.

See ATTACHMENT OF DEBTS, 1.

ASSIGNMENT FOR CREDITORS.

See ATTACHMENT OF DEBTS, 2.

ATTACHMENT OF DEBTS.

1. *Rents—Ex Parte Orders—Rescission of—Mortgagee—"Party Affected"—Notice to Tenants—Attornment—Assignment of Rents.*—*Held*, reversing the decision of the Common Pleas Divisional Court, 16 P. R. 555, that mortgagees who had served notice upon tenants of the mortgagor, in occupation of the mortgaged premises, to pay the rents to them, and to whom such tenants had attorned, were, within the meaning of Rule 536, "parties affected" by *ex parte* orders obtained by a judgment creditor of the mortgagor attaching such rents as debts. And *semble*, *per* OSLER, J. A., that, even without that Rule, the practice would have warranted a substantive motion by a third party interested to discharge the attaching orders.

Held, also, that the attaching orders ought to be set aside; for, (1) although the service of the notice upon the tenants was not in itself sufficient to cause the tenants subsequent to the mortgage to hold of the mortgagees, there was satisfactory evidence of an attornment by the tenants; and (2) the notice

signed by the mortgagor under the words "I approve of the above," operated as an assignment of the rents to the mortgagees.

An attaching order binds only such debts as the debtor can honestly deal with without affecting the interests of third persons. *Parker v. McIlwain*, 84.

2. *Assignment for Benefit of Creditors—Executions—Priorities—Sheriff—Creditors' Relief Act, sec. 37.*—An assignment by an insolvent for the general benefit of his creditors does not oust a prior attachment by a creditor of the insolvent of a debt due to him.

Wood v. Joselin, 18 A. R. 59, followed.

Section 37, sub-sec. 3, of the Creditors' Relief Act must be construed to refer only to a case where the facts would entitle a sheriff, if there had been no attaching order issued by a creditor, to obtain one at his own instance, under sub-sec. (1) of sec. 37; and, to entitle him to such order, there must be in his hands several executions and claims, and not sufficient lands or goods to pay all and his own fees, and a debt owing to the execution debtor by a person resident in the bailiwick.

And where a debtor, who was entitled to certain insurance moneys, assigned them to his wife, who subsequently assigned them to her husband's assignee for the benefit of creditors, and such moneys were also attached by a creditor of the husband between the dates of the assignment to his wife and his assignment for creditors; and some months after these transactions, when the moneys were in Court awaiting the result of litigation between the assignee and the attaching creditor, two executions

against the debtor came into the hands of the sheriff of the county in which the insurance company in whose hands the moneys were when attached had its head office:—

Held, that the moneys had ceased to be the property of the debtor, and, even if there had been no attaching order, the sheriff could not have obtained the moneys for the purpose of satisfying the executions.

Semle, also, that the provisions of sub-sec. (3) of sec. 37 should be read as confined to creditors having executions and claims in the sheriff's hands at the time of the attaching of the debt. *Re Thompson*, 109.

3. *Rule 935—Garnishee "within Ontario"—Foreign Insurance Company—55 Vict. ch. 39, secs. 14, 17.*—The garnishees, an English insurance company, had an agent or attorney and a chief agency in Ontario, and service of process could be made upon such attorney for the purposes mentioned in secs. 14 and 17 of 55 Vict. ch. 39, the Ontario Insurance Corporations Act:—

Held, that the garnishees were not "within Ontario," within the meaning of Rule 935.

Canada Cotton Co. v. Parmalee, 13 P. R. 308, followed.

County of Wentworth v. Smith, 15 P. R. 372, distinguished. *Boswell v. Piper et al.*, 257.

ATTORNEY-GENERAL.

See AMENDMENT, 3.

ATTORNEYMENT.

See ATTACHMENT OF DEBTS, 1.

AWARD.

See ARBITRATION AND AWARD—
COSTS, ETC., 34.

BAILEES.

See INTERPLEADER.

BILLS OF SALE ACT.

See AMENDMENT, 1.

CA. SA.

See ARREST, 1.

CASES.

Allen v. Furness, 20 A. R. 34, specially referred to, 356.]—*See* RECEIVER, 4.

Andrews v. City of London, 12 P. R. 44, applied and followed, 513.]—*See* COSTS, ETC., 18.

Attenborough v. St. Katharine's Dock Co., 3 C. P. D. 450, followed, 277.]—*See* INTERPLEADER.

Attorney-General v. Wilson, 9 Sim. 526, distinguished, 567.]—*See* CONTEMPT OF COURT.

Baldwin v. McGuire, 15 P. R. 305, commented on, 161.]—*See* JURY NOTICE 1.

Baldwin v. McGuire, 15 P. R. 305, distinguished, 446.]—*See* JURY NOTICE 4.

Bates v. Eley, 1 Ch. D. 473, followed, 379.]—*See* ACCOUNT.

Birmingham and District Land Co. v. London and North-Western R. W. Co., 34 Ch. D. 261, followed, 39.]—*See* INDEMNITY.

Booth v. Briscoe, 2 Q. B. D. 496, distinguished, 241.]—*See* PARTIES, 4.

Browne v. Dunn, 6 R. 67, applied and followed, 224.]—*See* AMENDMENT, 2.

Brown v. Hose, 14 P. R. 3, distinguished, 513.]—*See* COSTS, ETC., 18.

Brown, In re, Ward v. Morse, 23 Ch. D. 377, followed, 477.]—*See* COSTS, ETC., 17.

Canada Cotton Co. v. Parmalee, 13 P. R. 308, followed, 257.]—*See* ATTACHMENT OF DEBTS, 3.

Canadian Pacific R. W. Co. v. Little Seminary of Ste. Thérèse, 16 S. C. R. 606, followed, 199.]—*See* APPEAL, 1.

Carter v. Rigby, [1896] 2 Q. B. 113, followed, 241.]—*See* PARTIES, 4.

Cavender's Trusts, Re, 16 Ch. D. 270, followed, 332.]—*See* APPEAL, 5.

Chambers v. Kitchen, 16 P. R. 219, affirmed, 3.]—*See* REVIVOR, 1.

Clagett's Estate, In re, 20 Ch. D. 637, followed, 172.]—*See* APPEAL, 10.

Clark v. St. Catharines, 10 P. R. 205, distinguished, 167.]—*See* COSTS, ETC., 26.

Clark v. Virgo, 17 P. R. 260, followed, 295.]—*See* COSTS, ETC., 11.

Clarke v. Smith, 2 H. & N. 753, followed, 458.]—*See* PARTIES, 6.

Coffey v. Scane, 22 A. R. 269, approved, 353.]—See ARREST, 2.

Colquhoun, Re, 5 DeG. M. & G. 35, followed, 295.]—See COSTS, ETC., 11.

Compton v. Preston, 21 Ch. D. 138, followed, 47.]—See COUNTERCLAIM.

Credits Gerundeuse v. Van Weede, 12 Q. B. D. 171, distinguished, 339.]—See INTERPLEADER.

Crowther v. Appleby, L. R. 9 C. P. 23, distinguished, 567.]—See CONTEMPT OF COURT.

Dawson v. Moffatt, 11 O. R. 484, followed, 201.]—See CREDITORS' RELIEF ACT.

Doyle v. Kaufman, 3 Q. B. D. 340, followed, 458.]—See PARTIES, 6.

Dwight and Macklam, Re, 15 O. R. 148, followed, 567.]—See CONTEMPT OF COURT.

Elliott v. McCuaig, 13 P. R. 416, explained, 353.]—See ARREST, 2.

Flegg v. Prentiss, [1892] 2 Ch. 428, specially referred to, 356.]—See RECEIVER, 4.

Flood v. Jackson, [1895] 2 Q. B. 21, specially referred to, 419.]—See PLEADING, 2.

Frankenstein v. Gavin's Cycle Co., [1897] 2 Q. B. 62, followed, 540.]—See DISCOVERY, 10.

Freed v. Orr, 6 A. R. 690, not followed, 332.]—See APPEAL, 5.

Gallagher v. Bathie, 2 U. C. L. J. N. S. 73, applied and followed, 264.]—See DIVISION COURTS.

Geddes and Wilson, Re, 2 Ch. Chamb. R. 447, followed, 36.]—See COSTS, ETC., 1.

Gledhill v. Hunter, 14 Ch. D. 492, followed, 21.]—See JUDGMENT, 1.

Gordon v. Armstrong, 16 P. R. 432, explained, 18.]—See COSTS, ETC., 22.

Grant v. Banque Franco-Egyptienne, 2 C. P. D. 430, followed, 545.]—See COSTS, ETC., 38.

Griffiths v. Patterson, 22 L. R. Ir. 656, not followed, 477.]—See COSTS, ETC., 17.

Hamelyn v. White, 6 P. R. 143, doubted but followed, 404.]—See DISCOVERY, 6.

Hartas v. Scarborough, 33 Sol. J. 661, followed, 65.]—See COSTS, ETC., 4.

Hately v. Merchants' Despatch Transportation Co., 12 A. R. 640, followed, 9.]—See PARTIES, 1.

Heighington v. Grant, 1 Beav. 228, followed, 260.]—See COSTS, ETC., 8.

Holland v. Fox, 3 E. & B. 977, followed, 172.]—See APPEAL, 10.

Holland v. Leslie, [1894] 2 Q. B. 346, 450, followed, 377.]—See AMENDMENT, 5.

Hooper v. Hooper, 3 Sw. & Tr. 256, followed, 45.]—See WRIT OF SUMMONS, 2.

Jarvis v. Great Western R. W. Co., 8 C. P. 280, approved, 77.]—See COSTS, ETC., 6.

Kay v. Briggs, 22 Q. B. D. 643, followed, 395.]—See APPEAL, 7.

Keith v. Keith, 25 Gr. 113, followed, 45.]—See WRIT OF SUMMONS, 2.

Knickerbocker v. Ratz, 16 P. R. 191, followed, 578.]—See COSTS, ETC., 19.

Leslie v. Poulton, 15 P. R. 332, applied and followed, 496.]—See JUDGMENT, 13.

London, Bank of v. Wallace, 13 P. R. 176, distinguished, 356.]—See RECEIVER, 4.

Lord, Re, L. R. 2 Eq. 605, followed, 379.]—See ACCOUNT.

Magurn v. Magurn, 3 O. R. 579, followed, 45.]—See WRIT OF SUMMONS, 2.

Meacham v. Cooper, L. R. 16 Eq. 102, followed, 379.]—See ACCOUNT.

Meriden Britannia Co. v. Braden, 16 P. R. 410, affirmed, 77.]—See COSTS, 6.

Milligan v. Sils, 13 P. R. 350, not followed, 415.]—See VENUE, 2.

Minter v. Kent, etc., Land Society, 11 Times L. R. 197, referred to, 237.]—See RECEIVER, 2.

Molsons Bank v. Cooper, 16 P. R. 195, applied and followed, 496.]—See JUDGMENT, 13.

Morris v. Edwards, 23 Q. B. D. 287, followed, 404.]—See DISCOVERY, 7.

Mulholland v. Misener, 17 P. R. 132, followed, 134.]—See DISCOVERY, 1.

McAllister v. Cole, 16 P. R. 105, followed, 415.]—See VENUE, 2.

McArthur v. Dudgeon, L. R. 15 Eq. 102, followed, 379.]—See ACCOUNT.

McCabe v. Bank of Ireland, 14 App. Cas. 413, followed, 530.]—See COSTS, ETC., 37.

McCulloch v. McCulloch, 4 C. L. T. 452, followed, 440.]—See PLEADING, 3.

McDermott v. Grout, 16 P. R. 215, approved, 363.]—See JURY.

McGuin v. Fretts, 13 O. R. 699, distinguished, 356.]—See RECEIVER, 4.

McLean v. Allen, 14 P. R. 84, distinguished, 237.]—See RECEIVER, 2.

McLean v. Allen, 14 P. R. 291, not followed, 356.]—See RECEIVER, 4.

McVicar v. McLaughlin, 16 P. R. 450, distinguished, 206.]—See JUDGMENT, 10.

McVicar v. McLaughlin, 16 P. R. 450, followed, 92.]—See JUDGMENT, 9.

Nazer v. Wade, 1 B. & S. 728, followed, 458.]—See PARTIES, 6.

Nurse v. Durnford, 13 Ch. D. 764, followed, 24.]—See COSTS, ETC., 21 (a).

Page v. Midland R.W. Co., [1894] 1 Ch. 11, distinguished, 39.]—See INDEMNITY.

Parker v. McIlwain, 16 P. R. 555, reversed, 84.]—See ATTACHMENT OF DEBTS, 1.

Peer v. North-West Transportation Co., 14 P. R. 381, referred to, 124.] —See VENUE, 1.

Pelton v. Harrison (No. 2), [1892] 1 Q. B. 118, followed, 565.] —See COSTS, ETC., 19.

Percy and Kelly Nickel Co., Re, 2 Ch. D. 531, followed, 490.] —See COSTS, ETC., 36.

Pharmaceutical Society v. London & Provincial Supply Association, 5 App. Cas. 857, specially referred to, 387.] —See DISCOVERY, 4.

Potts, In re, 10 Mor. B. C. 52, specially referred to, 356.] —See RECEIVER, 4.

Potts, Re, [1893] 1 Q. B., at p. 662, referred to, 237.] —See RECEIVER, 2.

Regina v. Verral, 16 P. R. 444, affirmed, 61.] —See EVIDENCE.

Riding v. Smith, 1 Ex. D. 91, specially referred to, 419.] —See PLEADING, 2.

Robinson, Re, 16 P. R. 423, affirmed on one ground of appeal, 137.] —See SOLICITOR AND CLIENT, 1.

Sadler v. Great Western R.W. Co., [1896] A. C. 450, followed, 480.] —See PARTIES, 7.

Sarnia Oil Co., Re, 15 P. R. 347, followed, 395.] —See APPEAL, 7.

Smurthwaite v. Hannay, [1894] A. C. 494, followed, 241.] —See PARTIES, 4.

Smurthwaite v. Hannay, [1894] A. C. 494, followed, 480.] —See PARTIES, 7.

Smurthwaite v. Hannay, [1894] A. C. 494, 506, specially referred to, 458.] —See PARTIES, 6.

Stevens v. Grout, 16 P. R. 210, overruled, 363.] —See JURY.

Stevenson, Ex p., [1892] 1 Q. B. 394, 609, followed, 395.] —See APPEAL, 7.

Stevenson v. City of Kingston, 31 C. P. 333, approved, 77.] —See COSTS, ETC., 6.

Stuart v. Grough, 14 O. R., at p. 257, not followed, 356.] —See RECEIVER, 4.

Summerfeldt v. Johnston, 17 P. R. 6, distinguished, 477.] —See COSTS, ETC., 17.

Thibaudeau v. Herbert, 16 P. R. 420, distinguished, 359.] —See COSTS, ETC., 31.

Thompson v. Williamson, 16 P. R. 368, distinguished, 42.] —See COSTS, ETC., 23.

Tooth v. Frederick, 14 P. R. 287, not followed, 353.] —See ARREST, 2.

Watton v. Watton, L. R. 1 P. & M. 227, followed, 172.] —See APPEAL, 10.

Wentworth, County of v. Smith, 15 P. R. 372, distinguished, 257.] —See ATTACHMENT OF DEBTS, 3.

Whittaker v. Kershaw, 44 Ch. D. 296, followed, 545.] —See COSTS, ETC., 38.

Williams v. Leonard, 16 P. R. 544, affirmed, 73.] —See AMENDMENT, 1.

Williams v. Leonard, 16 P. R. 544, 17 P. R. 73, followed, 470.]—
See AMENDMENT, 7.

Winnett v. Appelbe, 16 P. R. 57, distinguished, 419.]—See PLEADING, 2.

Wood v. Joselin, 18 A. R. 59, followed, 109.]—See ATTACHMENT OF DEBTS, 2.

Wormsley v. Sturt, 22 Beav. 398, followed, 379.]—See ACCOUNT.

Young v. Thomas, [1892] 2 Ch. 134, followed, 289.]—See COSTS, ETC., 10.

CAUSE OF ACTION.

See AMENDMENT, 5 — COUNTERCLAIM—JUDGMENT, 1—PARTIES, 3, 4, 6—WRIT OF SUMMONS, 1.

CERTIFICATE OF MASTER.

See APPEAL, 2.

CERTIFICATE OF TAXATION.

See SOLICITOR AND CLIENT, 2.

CHAMBERS MOTION.

See COSTS, ETC., 12.

CHATTEL MORTGAGE.

See AMENDMENT, 1.

CLUB.

See PARTIES, 7.

COMPANY.

See COSTS, ETC., 7, 38—PARTIES, 7.

CONTEMPT OF COURT.

Witness—Reference—Subpœna—Rule 484—Local Manager of Bank—Principal Officers Resident Outside the Province—Production of Bank Books—Disclosure of Bank Accounts.]—Upon a motion by the plaintiff to commit the local manager of a chartered bank, who was subpœnaed to attend before a Master upon a reference, and there to produce the books of the bank and give evidence, for his contempt in not complying with the subpœna:—

Held, that a subpœna may properly be issued to compel the attendance of a witness before a Master, who has jurisdiction by Rule 484.

2. That it was unreasonable to expect the witness to take from the bank the books that were in use and attend during banking hours for the purpose of an examination in a matter in which he had no interest except as a witness; and it would therefore be proper for the Master to take the evidence at the banking offices after banking hours.

3. That where the head office of the bank is outside of the Province, the local manager is the person in charge and custody of the books, and is the proper person to subpœna to produce them, and should be ordered to do so, more especially where it does not appear that in so doing he will be contravening any rule or regulation of the bank.

Re Dwight and Macklam, 15 O. R. 148, followed.

Crowther v. Appleby, L. R. 9 C. P. 23, and *Attorney-General v. Wilson*, 9 Sim. 526, distinguished.

4. That the witness's objection to produce the books, because the bank was precluded by law from exhibiting to any one or permitting any one to inspect the account of any person dealing with the bank, was untenable, the evidence sought being as to entries made of financial transactions in which a deceased person was engaged, his representatives desiring to know what moneys the bank received and what disposition was made of them, and all parties interested being willing that the evidence should be given. *Hannum v. McRae et al.*, 567.

CONTRACT BY CORRESPONDENCE.

See WRIT OF SUMMONS, 1.

COPIES OF DEPOSITIONS.

See COSTS, ETC., 12.

COSTS AND SECURITY FOR COSTS.

SECURITY FOR COSTS FROM NOS. 22
et seq.

1. *Mortgage Action—Appearance—Judgment—Rule 718 (1349).*—Where a defendant in a mortgage action desires only to dispute the amount claimed, but, instead of giving the notice referred to in Rule 718 (1349), enters an appearance in which he disputes the amount, judgment cannot be entered on *præcipe*; a motion to the Court becomes necessary, and the defendant so appearing must pay the additional costs of it:—

Semble, in such a case, that where there are several defendants, there

should be only one judgment against all. *Rice v. Kinghorn et al.*, 1.

2. *Taxation—Claim and Counterclaim.*—Where judgment is given for the plaintiff upon his claim with costs, and for the defendant upon his counterclaim with costs, the amounts to be set off, the costs should be taxed so as to allow the plaintiff the costs on his claim as though he had wholly succeeded in the suit, and the defendant the costs of the counterclaim as though he had wholly succeeded in the suit. *Summerfeldt v. Johnston*, 6.

3. *Solicitor and Client—Action—Reference—Taxation—R. S. O. ch. 147, sec. 32—Costs of Unsuccessful Application—Costs Paid to Opposite Party—Counsel Fees—Quantum—Discretion.*—By the judgment in an action it was ordered that the plaintiffs should recover against the defendant whatever amount should be found due to them on the taxation of their solicitors' bills of costs of certain litigation, as between solicitor and client, and certain bills were referred for taxation between solicitor and client.

Upon appeal from the taxation:—*Held*, that it was to be treated as if it had been directed on an application, under sec. 32 of the Solicitors' Act, R. S. O. ch. 147, by the defendant as the person chargeable, and was a taxation between the solicitors and their clients, the plaintiffs.

2. That the decision of the taxing officer allowing to the solicitors the costs of an unsuccessful interlocutory application, undertaken in the exercise of an honest and fair discretion, should not be interfered with.

3. That the payment by the solicitors to the opposite party in the

litigation of a sum for interlocutory costs which the plaintiffs were ordered to pay, while not properly such a disbursement as should be included in the bill of the costs of the action, was a proper payment on behalf of the clients, to which, payments credited on the reference might have been applied, and should be treated as so applied.

4. That, notwithstanding the provisions of the tariff, the taxing officer was justified in taxing larger counsel fees upon this taxation than had already been allowed between solicitor and client for the same services, and that his discretion as to the amount thereof should not be interfered with.

Re Geddes and Wilson, 2 Ch. Chamb. R. 447, followed. *Smith et al. v. Harwood*, 36.

4. *Third Parties—Indemnity.*—The defendants, having paid to other persons the moneys claimed by the plaintiff, brought in those persons as third parties for indemnity, whereupon the third parties paid the plaintiff the amount of his claim and costs:—

Held, that the defendants were entitled to be paid by the third parties, their costs of defence to be taxed between solicitor and client, and their costs of the claim over against the third parties to be taxed between party and party.

Hartas v. Scarborough, 33 Sol. J. 661, followed. *King v. Federal Life Assurance Company*, 65.

5. *County Court—Nonsuit by Judge ex mero motu—Appeal.*—Upon the trial of a County Court action, counsel for the defendants, at the close of the plaintiff's case, formally moved for a nonsuit, and stated that he would renew the

motion at the close of the defendants' case. Then he called and examined three witnesses, but, when a fourth was sworn, the Judge interposed and said he would take the responsibility of entering a nonsuit. He heard argument from the plaintiff's counsel opposing this course, and the defendants' counsel said he proposed to tender his evidence and go on and complete the case. The Judge refused to hear further evidence, and entered a nonsuit, which in term he refused to set aside, the defendants' counsel neither opposing nor assenting to the motion. The plaintiff successfully appealed to the Court of Appeal. Upon the argument there, the defendants' counsel took the same position, but urged that the defendants should not be ordered to pay costs:—

Held, however, that nothing was shewn to induce the Court to depart from the general rule; and the defendants were ordered to pay the costs of the appeal, the lost trial, and the motion in term.

The mere fact that the Judge below has *ex mero motu* made an erroneous adjudication is not a ground for absolving the respondent from the costs of the appeal. *Mills v. Hamilton Street Railway Co.*, 74.

6. *Liability to Solicitor—Taxation against Opposite Party.*—Where, by the terms of an express contract, a party is not to be liable for costs to the solicitor representing him in an action, he cannot tax costs against the opposite party.

Jarris v. Great Western R. W. Co., 8 C. P. 280, and *Stevenson v. City of Kingston*, 31 C. P. 333, approved.

Decision of the Chancery Division, 16 P. R. 410, affirmed. *Meriden Britannia Co. v. Braden et al.*, 77.

7. *Company—Liquidator—R. S. C. ch. 129, sec. 31 (a)—Claim and Counterclaim.*—Where an action is brought by the liquidator of a company in liquidation, in the name of the company, and he is not otherwise a party to it, he cannot be ordered personally to pay the costs of it.

Where the plaintiff succeeds upon his claim, and the defendant upon his counterclaim, the former should receive the costs of the action, and the latter those of the counterclaim.

Judgment of ROSE, J., varied. *Ontario Forge and Bolt Co. v. Comet Cycle Co.*, 156.

8. *Taxation—Two Defendants Appearing by Same Solicitor—Appeal—Extension of Time—Solicitor's Mistake—Objections to Taxation—Question of Principle—Rules 1230, 1231.*—An action against two defendants, who defended by the same solicitor, was dismissed as against one with costs, and judgment was given for the plaintiff against the other with costs:—

Held, that the successful defendant should on taxation be allowed the costs of services (if any) appertaining wholly to his own defence, and at most only a proportionate part of the costs of services appertaining to both defences, as in *Heighington v. Grant*, 1 Beav. 228.

Time for appealing from taxation extended, as a matter of discretion, where, by the mistake of the solicitor, the appeal was at first brought on in due time in the wrong forum, and after that, but too late, in the proper forum.

Where the principle on which the taxing officer acts is objected to, that is to say, his mode or method of proceeding in taxing the bill, it is not

necessary for the party proposing to appeal to carry in written objections before the officer, as provided for by Rule 1230, to enable him to review his taxation, under Rule 1231. *Clark v. Virgo et al.*, 260.

9. *Taxation—Successful Defence Upon One Ground—Costs Relating to Other Grounds.*—It was adjudged that the plaintiff should pay to the defendants so much of the costs of the action (upon a building contract), reference, and appeal, as were occasioned by reason of his claiming to be allowed as against the defendants, for extra work, anything in addition to the sums allowed therefor by the architect:—

Held, that in taxing costs under this direction the officer was in error in disallowing to the defendants the costs of witnesses called to shew the value, etc., etc., of the extras that had been disallowed to them by the architect's certificate, which was attacked by the plaintiff. The defendants were not called upon to stand upon a single item of evidence, though in the end it might appear that the item would have been sufficient for their purposes. *Lockard v. Waugh et al.*, 269.

10. *Discretion—Judicial Officer—Appeal—Interference—Rule 1170 (a).*—The Court will not interfere with the discretion exercised as to costs, unless the Judge whose order is appealed from has proceeded upon some erroneous principle of law or upon some misapprehension of the facts of the case.

Young v. Thomas, [1892] 2 Ch. 134, followed.

It is not intended by Rule 1170 (a) that the discretion of the appellate tribunal should be substituted for that of the judicial officer whose

decision is appealed from. *Campbell v. Wheeler et al.*, 289.

11. *Taxation—Apportionment—Common Defence by Several Defendants.*—An action by a judgment creditor against three defendants, one of whom was the judgment debtor, to set aside a conveyance as fraudulent, was dismissed with costs, but with the direction that the costs of the judgment debtor should be set off against the judgment recovered by the plaintiff. There was a common defence by one solicitor for all three defendants, and no separate proceedings for the benefit of particular defendants:—

Held, upon appeal from taxation, that a set-off of one-third of the whole costs taxed to the defendants should be allowed.

Re Colquhoun, 5 DeG. M. & G. 35, and *Clark v. Virgo*, 17 P. R. 260, followed. *Zavitz v. Dodge et al.*, 295.

12. *Taxation—Chambers Motion—Copies of Depositions.*—In taxing the costs of a motion in Chambers, no allowance can be made for copies of depositions taken for use upon the motion. *Rennie v. Block*, 317.

13. *Will—Appeal—Costs out of Estate—Watching Brief.*—The costs of opposing an unsuccessful appeal to the Court of Appeal from a judgment establishing a will and codicil were ordered to be paid to the respondents, who were the executors, and certain legatees, out of the estate, in the event of their not being able to make them out of the appellant; the costs of the executors to be only as on a watching brief. *Re Cassie, Toronto General Trusts Co. v. Allen et al.*, 402.

14. *Infants—Next Friend—Costs out of Estate or Share.*—The plaintiffs, infants suing by a next friend, claimed against their father and the executors of a will a forfeiture by their father of his share of the testator's estate, and that they had become entitled to it. The action was occasioned by acts which, if they occurred, were done by the legatee after the testator's death. The action was successful in the High Court, but was dismissed on appeal to the Court of Appeal:—

Held, that the costs should not be made payable out of the testator's estate, nor out of the share of the infants' father, but should be paid by the next friend, without prejudice to his claim for indemnity out of the shares of the infants whenever they should come into possession.

In general a next friend is in the same position as any other litigant, and receives or pays costs personally as between himself and the defendants. *Smith et al. v. Mason et al.*, 444.

15. *Defendant Company in Liquidation—Liquidator Intervening—Personal Order for Costs.*—After the action was at issue, an order was made by a Quebec Court directing the winding-up of the defendant company and appointing a liquidator. The plaintiff then obtained leave from that Court to proceed with this action. Afterwards the liquidator obtained an order from that Court authorizing him to intervene and defend this action in his own name as liquidator; he then applied to this Court in this action, and obtained an order that the action proceed in the name of the plaintiff against the company and the liquidator:—

Held, that the liquidator having thus intervened and made himself a party to the action, and having appeared by his counsel at the trial and contested the claim of the plaintiff, the latter, having succeeded upon his claim, was entitled to a judgment for his costs both against the company and the liquidator personally.

This Court had no authority to direct that the liquidator might reimburse himself out of the assets; that was a question for the Court in the Province of Quebec having control of the assets. *Boyd v. Dominion Cold Storage Co.*, 468.

16. *Damages—Set-off—Solicitor's Lien—Rule 1205.*]—There can be no set-off of damages or costs between the same parties in different actions, to the prejudice of the solicitor's lien; that is the effect of Rule 1205.

The lien is simply a right to the equitable interference of the Court not to leave the solicitor unpaid for his services, and it exists if it is made to appear that the solicitor has not been paid his costs. *Turner v. Drew*, 475.

17. *Taxation—Items Common to Defence and Counterclaim.*]—A claim and counterclaim are to be treated as separate actions, and the costs are to be taxed in accordance with that principle; but items common to both defence and counterclaim should not be taxed, either in whole or in part, to a defendant who has succeeded upon his counterclaim, but should be wholly disallowed him.

In re Brown, Ward v. Morse, 23 Ch. D. 377, followed.

Griffiths v. Patterson, 22 L. R. Ir. 656, not followed.

Summerfeldt v. Johnston, 17 P. R.

6, distinguished. *Haggert v. Town of Brampton et al.*, 477.

18. *Scale of—Jurisdiction of Taxing Officer—Rule 1174.*]—Where there has been a trial of an action, and the plaintiff has thereat been awarded costs, Rule 1174 gives no jurisdiction to the taxing officer to deal with the scale of costs.

Brown v. Hose, 14 P. R. 3, distinguished.

Andrews v. City of London, 12 P. R. 44, applied and followed. *Dale v. Weston Lodge I. O. F.*, 513.

19. *Married Woman—Judgment Against—Costs Payable out of Separate Property—Costs Payable to Married Woman—Set-off.*]—Judgment for debt and costs having been recovered by the plaintiffs against the defendant, a married woman, to be levied out of her separate estate, there was an appeal by the plaintiffs with regard to the form of the judgment, which was dismissed with costs.

An application to vary the order made upon the appeal by directing that the costs thereof should be set off *pro tanto* against the amount of the judgment was refused; but the Court intimated that the taxing officer, upon taxing the costs of the appeal, would have power under Rule 1164 to set them off *pro tanto* against the costs awarded by the judgment to be levied out of the defendant's separate property.

Pelton v. Harrison (No. 2), [1892] 1 Q. B. 118, followed. *Hammond et al. v. Keachie*, 565.

20. *Alimony—Disbursements—Prospective Counsel Fee—Solicitor—Rule 1144.*]—Rule 1144 does not warrant the making of an order for payment by defendant to plain-

tiff's solicitors in an alimony action, of a sum to cover counsel fees, unless it is shewn that the fees are to be paid to counsel who is not the solicitor for the plaintiff or the partner of the solicitor. *Gallagher v. Gallagher*, 575.

21. *Libel—Apology—Satisfaction—Trial of Question of Costs—Application at Chambers.*—After action for libel brought, the defendants published a retraction and apology, which was accepted as satisfactory by the plaintiff. The defendants declined to pay the plaintiff's costs up to that time, and the plaintiff proceeded to trial:—

Held, MEREDITH, C. J., dissenting, that either party could, after the publication of the apology and its acceptance by the plaintiff, have moved in Chambers to have the question of costs disposed of; but, neither party having moved, that the plaintiff should have such costs only as he would have been entitled to had he so moved, and that the defendants should have no costs.

Knickerbocker v. Ratz, 16 P. R. 191, followed.

Judgment of ARMOUR, C.J., varied. *Eastwood v. Henderson et al.*, 578.

21 (a). *Unauthorized Proceedings—Solicitor—Judgment—Relief—Laches—Repayment of Moneys.*—A person who finds himself a party plaintiff to proceedings which he has never authorized is entitled to be relieved from liability in connection with them, whether the solicitor in fault be solvent or not; and the fact that an order dismissing the action has been issued before the applicant becomes aware that his name has been used makes no difference in the rule.

Nurse v. Durnford, 13 Ch. D. 764, followed.

Delay in moving to set aside the proceedings from the 1st August to the 25th September:—

Held, not a bar to relief, where no detriment had resulted to the defendants thereby.

The sheriff having seized the plaintiff's goods under execution upon an order dismissing the action with costs, the plaintiff paid the costs to the sheriff, who undertook to hold the amount for ten days, "to be returned if writ set aside, and if not within that time, to be applied in payment of execution." After the lapse of more than ten days, during which the plaintiff took no step, the sheriff paid over the money to the defendants. The plaintiff having afterwards established his right to be relieved from liability:—

Held, that he was entitled to be repaid by the defendants. *Morris et al. v. Confederation Life Association et al.*, 24.

22. *Insolvent Plaintiff—Want of Beneficial Interest—Parties—Consent—Amendment—Discretion.*—To entitle a defendant to security for costs, it is not sufficient to shew that the plaintiff is a man of no means and has no beneficial interest in the subject-matter of the action; it must be shewn that it is really the action of some other person.

Gordon v. Armstrong, 16 P. R. 432, explained.

The defendant sought, in the alternative, to have the persons alleged to be really beneficially interested added as plaintiffs:—

Held, that they could not be added without their consent in writing: Rule 324 (b).

Leave given to amend the defence

by setting up that these persons were necessary parties.

Semble, however, that the Court has a discretion, under Rule 319, to proceed in the absence of some of the persons interested in the question under adjudication. *Major v. Mackenzie*, 18.

23. *Action for Penalty — Rule 1244—Time — Default — Dismissal of Action—Indulgence—Merits.*]—An order under Rule 1244 for security for costs in an action for a penalty may properly contain provisions limiting the time for giving security and for dismissal of the action, without further order, upon default; and such an order, not appealed against, is conclusive between the parties as to all its terms.

Thompson v. Williamson, 16 P. R. 368, distinguished.

The action was brought against justices of the peace to recover a penalty for non-return of a conviction of the plaintiff, the error of the defendants being merely clerical, and one not prejudicing the plaintiff:—

Held, not a case in which the indulgence of extending the time for giving security should be granted to the plaintiff. *Ashcroft v. Tyson et al.*, 42.

24. *Appeal to Court of Appeal—Special Order—Judicature Act, 1895, sec. 77.*]—Under sec. 77 of the Judicature Act, 1895, security was specially ordered to be given by the plaintiffs, in the sum of \$200, on their appeal to the Court of Appeal from the judgment of the trial Judge dismissing their action for the recovery of land of which the defendants and those under whom they claimed had been in undisturbed possession for nearly thirty years, where two of the plaintiffs resided

abroad, and the other two, who resided in this Province, had no property exigible under execution, the taxed costs in the Court below being unpaid, and execution therefor having been returned *nulla bona*. *Donnelly et al. v. Ames et al.*, 106.

25. *Appeal to Court of Appeal—Special Order—Judicature Act, 1895, sec. 77.*]—Standing alone, the appellant's poverty is not a circumstance, within the meaning of sec. 77 of the Judicature Act, 1895, entitling the respondent to a special order for security for costs. *McCormick v. Temperance and General Life Assurance Co. of North America*, 175.

26. *Class Suit—Insolvent Plaintiffs.*]—Security for costs was refused in an action brought by four rate-payers of a municipal corporation, on behalf of themselves and all others, against the corporation and reeve for an account of moneys received by the latter from the former, in spite of the financial incompetency of the plaintiffs, and the slight interest they possessed in the properties for which they were assessed, where the action was virtually the plaintiffs' action, and not that of third persons who were alleged to be putting the plaintiffs forward, and there was no contention that the action was frivolous.

Clark v. St. Catharines, 10 P. R. 205, distinguished. *McAllister et al. v. O'Meara et al.*, 167.

27. *Interpleader—Party out of Jurisdiction.*]—In a sheriff's interpleader the party out of the jurisdiction, whether claimant or execution creditor, may be ordered to give security for costs to his opponent in the issue; BURTON, J.A., dissenting.

Knickerbocker Trust Company of New York et al. v. Webster, 189.

28. *Rule 1243—Costs of Former Action Unpaid—Solicitor—Want of Authority.*]—Upon an application by the defendant under Rule 1243 for security for costs, upon the ground that the costs of a former action brought against him by the same plaintiff for the same cause, and discontinued, remained unpaid, the plaintiff contended that the former action, though brought by a solicitor in his name, was brought without his authority:—

Held, that there should be no discussion as to the incidence of the costs of a prior action, known to the plaintiff, he not having taken the proper steps to get rid of these costs prior to the launching of the second action. *Lea v. Lang*, 203.

29. *Appeal to Divisional Court—Judgment at Trial—Rule 1487 (803).*]—The words “appeal from a single Judge” in Rule 1487 (803) mean from a Judge presiding in Court; that Rule does not interfere with the right to appeal from the judgment of the trial Judge to a Divisional Court; and a party has still the right to prosecute such an appeal without terms being imposed as to giving security for costs.

Semble, that security should not be “specially ordered” under Rule 1487 (803), upon an appeal by the defendant, where substantial questions arise and the action is of a penal character. *Wilson v. Manes*, 239.

30. *Public Officer—59 Vict. ch. 18, sec. 7 (O.)—Pleading—Affidavits.*]—Where a person who holds a public office is made defendant in an action, the pleadings must be looked at to determine whether he is sued

in his capacity of a public officer, and so entitled to security for costs under sec. 7 of the Law Courts Act, 1896; and if the pleadings are of such a character that the case cannot on them go to the jury against the defendant as a public officer, he cannot claim the protection of the statute, even where he shews by affidavits that his sole connection with the matters alleged against him was in his public capacity. *Parkes v. Baker et al.*, 345.

31. *Præcipe Order—Motion to Set Aside—Security for Costs of—Rule 1251.*]—A plaintiff may move to set aside a præcipe order requiring him to give security for costs, notwithstanding the stay of proceedings imposed thereby, without giving security for costs; and, where his writ of summons is specially indorsed, he is not compelled to follow the procedure indicated in rule 1251, which is inapplicable unless he is moving for summary judgment under Rule 739.

Thibaudeau v. Herbert, 16 P. R. 420, distinguished. *Walters v. Duggan*, 359.

32. *Libel—Newspaper—R. S. O. ch. 57, sec. 9—Criminal Charge—Pleading—Innuendo.*]—Where a statement of claim in an action for libel contained in a public newspaper is not so defective as to be demurrable, and the words are alleged by the plaintiff to have been used in a sense which involves the making by the person using them of a criminal charge against the plaintiff, and may have that meaning, the case is brought within the exception contained in clause (a) of sec. 9 (1) of the Act respecting Actions of Libel and Slander, R. S. O. ch. 57, and the defendant is not entitled to

security for costs. That clause is applicable to cases where an innuendo is necessary to give the words complained of a defamatory sense; and upon an application for security there cannot be a trial of the action on the merits in order to determine whether the words used involve a criminal charge. *Smyth v. Stephenson*, 374.

33. *Plaintiff out of the Jurisdiction—Property in the Jurisdiction.*—Where the plaintiff lived out of the jurisdiction, but had real property in the jurisdiction, incumbered, but of the value of \$510 over and above all incumbrances and all debts that it was shewn or suggested that he owed, a præcipe order for security for costs was set aside. *Belair v. Buchanan*, 413, 476.

34. *Rule 1243—“Proceeding for the Same Cause”—Award—Motion to Set Aside—Appeal—Action—Matters not Included in Award.*—The word “proceeding” in Rule 1243 means a proceeding in Court.

An appeal from an order dismissing a motion to set aside an award made upon a voluntary submission is not a “proceeding for the same cause,” within the meaning of Rule 1243, as an action to recover moneys in respect of certain matters included in the submission, but not dealt with by the award; and, although the costs of such appeal are unpaid, security for costs of the action will not be ordered. *Caughell v. Brower*, 438.

35. *Appeal to Court of Appeal—Special Order—Judicature Act, 1895, sec. 77.*—Where there was no reason to suppose that the defendants were not intending to prosecute their appeal to the Court of Appeal

in good faith, where they were conforming to an injunction obtained by the plaintiffs at an early stage, and where their ability to answer for costs had not been put to the test of an execution, and the proof of their alleged inability to pay the plaintiffs’ costs, in case the appeal should prove unsuccessful, rested in great measure upon statements founded upon information and belief, a special order for security for costs under sec. 77 of the Judicature Act, 1895, was refused. *Welsbach Incandescent Gaslight Co. v. Stannard*, 486.

36. *Application Against Solicitor—Action Brought Without Authority—Applicants out of the Jurisdiction.*—When plaintiffs in an action repudiate the authority of the solicitor to take the proceedings, and move to set them aside, they cannot be compelled by the solicitor to give security for costs on the ground that they reside out of the jurisdiction.

Re Percy and Kelly Nickel Co., 2 Ch. D. 531, followed.

Where a charge of improper conduct is made against a solicitor, who is an officer of the Court, by a person out of the jurisdiction, the Court ought not to order security for costs, and thus prevent such a charge being investigated. *Sample et al. v. McLaughlin et al.*, 490.

37. *Prior Action—Costs Unpaid—New Plaintiff—Notice—Nominal and Insolvent Plaintiff.*—Security for costs may be ordered where the costs of a former action for the same cause are unpaid, even although the actions are not between precisely the same parties, if the plaintiffs are suing substantially by virtue of the same alleged title.

McCabe v. Bank of Ireland, 14 App. Cas. 413, followed.

And where the title to property, the subject of the present and a former action of ejectment, was shifted into the hands of the present plaintiff to evade, if possible, the effect of an order requiring the plaintiff in the former action to give security for costs—the former action having been dismissed for default of such security—and it appeared that the present plaintiff knew the history of the prior litigation, an order for security for costs was affirmed.

The order was also maintainable upon the ground that the plaintiff was a person of no substance, and the action brought mainly, if not entirely, for the benefit of some unknown and unnamed person, not a party to the record. *May v. Wenden*. *May v. Bedingfield*, 530.

38. *Court of Appeal — Special Order—Judicature Act, 1895, sec. 77—Foreign Domicil—Company—Winding-up—Property in Jurisdiction.*—Where both the appellants were domiciled out of Ontario, and one of them, an incorporated company, was in process of winding-up in the Province of Quebec under R. S. C. ch. 129 :—

Held, having regard to secs. 17, 39, and 66 of that Act, that the property of the company in Ontario was beyond reach of the process of the Court; and the circumstances were such that a special order for security for costs of the appeal should be made under Rule 1487 (803) of the 1st January, 1896, taken from sec. 77 of the Judicature Act, 1895.

Grant v. Banque Franco-Egyptienne, 2 C. P. D. 430, and *Whittaker v. Kershaw*, 44 Ch. D. 296, followed. *Boyd v. Dominion Cold Storage Co. et al.*, 545.

39. *Slander—52 Vict. ch. 14, sec. 1, sub-sec. 3 (O.)—Meaning of Words Used—Good Defence.*—In an action for slander brought by a married woman the words alleged to have been spoken were, “you are a blackguard; you are a bad woman;” and the innuendo was that the plaintiff was a common prostitute and a woman of evil character. Upon an application by the defendant under 52 Vict. ch. 14, sec. 1, sub-sec. 3 (O.), for security for costs, the defendant admitted having called the plaintiff “a bad, quarrelsome woman,” but said he did not recollect using, and believed he had not used, the word “blackguard,” and he denied that he used the words with the meaning attributed to them by the plaintiff :—

Held, MEREDITH, J., dissenting, that the defendant had not shewn a good defence to the action on the merits, and his application was properly refused.

Decision of MACMAHON, J., affirmed.

Per BOYD, C., and FERGUSON, J., that the expressions used might be employed in circumstances and surroundings such that bystanders might think them a statement of want of chastity.

Per MEREDITH, J., that as it was shewn by the pleadings and the affidavit of the defendant that there was a real and substantial question for the jury to pass upon, and upon which the action might fail, the defendant had shewn a good defence upon the merits. *Paladino v. Gustin*, 553.

See ACTION, 1—JUDGMENT, 2—JUDGMENT DEBTOR, 2—MORTGAGE—PARTIES, 2, 7—RECEIVER, 2—SOLICITOR AND CLIENT.

COUNSEL FEE.

See COSTS, ETC., 3, 20—**SOLICITOR AND CLIENT**, 3.

COUNTERCLAIM.

Recovery of Land—Joinder of Causes of Action—Rule 341—Mortgage Action—Leave.]—A counterclaim for the recovery of land is an action for the recovery of land, within Rule 341 as to joinder of causes of action.

Compton v. Preston, 21 Ch. D. 138, followed.

And a counterclaim for foreclosure and recovery of possession of mortgaged premises is within the exception contained in Rule 341 (a).

And where the plaintiff sought a mortgage account and redemption, and the defendant counterclaimed for foreclosure and possession :—

Held, that if leave were necessary, it was a proper case for granting it, the rights being correlative. *Hunter v. Stark*, 47.

See COSTS, ETC., 2, 7, 17.

COUNTY COURT.

See COSTS, ETC., 5.

COURT OF APPEAL, AMENDMENT IN.

See AMENDMENT, 2.

CREDITORS' RELIEF ACT.

Fund in Court—Payment Out—Execution Creditors—Sheriff—Distribution.]—Where the surplus proceeds of a mortgage sale were paid

into Court by the mortgagees, and claimed by execution creditors of the mortgagor, whose executions were in the hands of the sheriff at the time of the sale :—

Held, following *Dawson v. Moffatt*, 11 O. R. 484, and having regard to the provisions of sec. 24 of the Creditors' Relief Act, R. S. O. ch. 65, that the fund in Court should be paid to the sheriff for distribution in accordance with the provisions of that Act. *Re Bokstal*, 201.

CRIMINATING ANSWERS.

See DISCOVERY, 4.

CRIMINAL CONVERSATION.

See DISCOVERY, 1, 2.

CROSS APPEAL.

See APPEAL, 5.

CROWN.

See JURY NOTICE, 2.

DAMAGES.

See COSTS, ETC., 16—**INDEMNITY.**

DEBTOR AND CREDITOR.

See ATTACHMENT OF DEBTS, 2.

DEFAMATION.

See PLEADING, 1, 2, 4.

DEFAULT OF APPEARANCE.

See JUDGMENT, 4.

DEVOLUTION OF ESTATES ACT.

Widow — Dower — Election — Money in Court.]—Where a widow desires to take, under the Devolution of Estates Act, her interest in the proceeds of her husband's undisposed of real estate, in lieu of dower, she must so elect by an attested instrument in writing, pursuant to sec. 4, sub-sec. 2, even where the lands have been sold under an order of the Court at her instance, free from her dower, and the proceeds are in Court. *Re Galway*, 49.

See DOWER.

DISCHARGE FROM CUSTODY.

See ARREST, 1, 2.

DISCOVERY.

1. *Examination of Party—Criminal Conversation—R. S. O. ch. 61, sec. 7.*]—In an action for criminal conversation with the plaintiff's wife, the defendant cannot be compelled to submit to examination for discovery.

Construction of sec. 7 of R. S. O. ch. 61, and difference between it and sec. 3 of the Imperial Act 32 & 33 Vict. ch. 68 pointed out. *Mulholland v. Misener*, 132.

2. *Examination of Party—Criminal Conversation — Alienation of Affections—R. S. O. ch. 61, sec. 7.*]—In an action for criminal conversation the defendant cannot be com-

pelled to attend on examination for discovery.

Mulholland v. Misener, supra, followed.

But where in the action damages are also claimed for the alienation of the affections and loss of the society of the plaintiff's wife, the defendant can be examined upon that branch of the case.

Construction of sec. 7 of R. S. O. ch. 61, and difference between it and sec. 3 of the Imperial Act 32 & 33 Vict. ch. 68 pointed out. *Taylor v. Neil*, 134.

3. *Examination of Officer of Railway Company—Flagman.*]—A flagman in the employment of a railway company whose duty it is to give notice of danger to persons intending to cross a line of railway at a particular place, he being under the superintendence of the yard foreman, is not an officer of the company examinable for discovery at the instance of the plaintiff in an action against the company to recover damages for injuries sustained through the alleged neglect of the flagman to give notice of danger. *Henderson v. Canada Atlantic Railway Co.*, 337.

4. *Defamation — Production of Documents—Privilege—Criminating Answers—R. S. O. ch. 61, sec. 5—Incorporated Company—Indictment.*]—A person is protected against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards doing so; the person however, or, in the case of a corporation, an officer, must pledge his oath to his belief that such would or might be the effect of his answer, and it must appear that such belief is likely to be well founded.

The statute, R. S. O. ch. 61, sec. 5, has merely embodied the existing law as to the protection of a witness against answering questions tending to criminate, though including the case of a party examined as a witness or for the purpose of discovery.

In regard to affidavits of documents the same privilege exists as in regard to questions put to a witness or party.

The proposition that a corporation is not liable to an indictment for libel is at least so doubtful that it would not be proper to compel a newspaper publishing corporation to make production of documents on oath which might tend to subject them to a criminal prosecution.

Pharmaceutical Society v. London and Provincial Supply Association, 5 App. Cas. 857, specially referred to.

Legislation suggested, similar to 32 & 33 Vict. ch. 24 (Imp.), to afford an easy means of proving by whom a newspaper is published. *D'Ivry v. World Newspaper Co. of Toronto et al.*, 387.

5. *Examination of Officers of Corporation — Rule 487.*]—In an action to recover moneys alleged to have been deposited with the defendants, a banking corporation, at a branch, the plaintiff examined for discovery as officers the persons who were respectively manager and ledger-keeper at the branch at the time the alleged deposits were made. He then sought to examine the general manager :—

Held, that the plaintiff had the right under Rule 487 to examine the general manager as an officer of the corporation, and, the regular means of procuring his attendance having been taken, there was no excuse for his non-attendance. *Dill v. Dominion Bank*, 488.

6. *Affidavit of Documents—Cross-examination—Examination on Pending Motion — Appointment — Residence of Party.*]—Where a plaintiff is so situated that he may for some purposes be deemed to have more than one residence within the jurisdiction and in the writ of summons he designates one of these places as the place where he resides, that place is to be considered his place of residence for the purposes of the action; and an appointment for his examination in another county is irregular.

Rule 512, providing that the deponent in every affidavit on production shall be subject to cross-examination, having been rescinded by Rule 1337, it is not competent for a party to obtain, in effect, a cross-examination of such a deponent upon his affidavit by the indirect means of examining him under Rule 578 for the purpose of using his evidence upon a motion for a better affidavit. *Dryden v. Smith*, 500.

7. *Production of Documents—Affidavit—Privilege—Confidential Communications—Solicitor and Client—Application for Better Affidavit.*]—In an affidavit of a party on production of documents, a certain letter was described by its date and as being from a firm of solicitors to the deponent, who said that he objected to produce it, that it was a communication between solicitor and client, and was privileged :—

Held, doubting, but following *Hamelyn v. White*, 6 P. R. 143, that the statement was sufficient to protect the document from production.

In the same affidavit two other letters were described by their dates and as being from a solicitor to a firm of solicitors, and a copy of a letter written in answer to one of

them was similarly described. These documents, the affidavit stated, were in the possession of the solicitors for the deponent and others in another action, and he objected to produce them and claimed privilege for them "on the ground that they are communications between solicitor and client and between my solicitors and others in the course of their conducting my business :"—

Held, that these letters not being written to or by the deponent, there was no reasonable intendment that the deponent was the "client" referred to, nor that they were necessarily confidential because they were written by the deponent's solicitors to other persons in the course of their conducting his business; and the opposite party was entitled to a better affidavit on production, in which the deponent might set up other grounds of protection.

It is irregular to go into the merits upon an application for a better affidavit.

Morris v. Edwards, 23 Q. B. D. 287, followed. *Hoffman v. Crerar et al.*, 404.

8. *Documents — Photographs — Privilege—Rule 507.*—In an action by certain persons, claiming to be the next of kin of a testator, the beneficiary under the will having predeceased him, against the administratrix with the will annexed, for administration of the estate, the defendant denied that the plaintiffs were the next of kin of the testator, and alleged that he had no relatives. By her affidavit of documents she stated that she had in her possession, in her personal capacity, but not as administratrix, certain photographs of the testator, which she objected to produce. The plaintiffs sought production with a view of establish-

ing the identity of a relative of theirs with the testator :—

Held, that the photographs in question were "documents" within the meaning of Rule 507, and were not privileged nor protected, and therefore must be produced. *Fox et al. v. Sleeman et al.*, 492.

9. *Production of Documents—Affidavit—Objection to Produce—Specification of Document.*—Where, in an affidavit of documents made in compliance with the usual order for production, only one document is mentioned, and the possession or control of other documents is negatived, the statement "I object to produce the said document" complies with Rule 513 and sufficiently specifies the document mentioned in the affidavit which the defendant objects to produce, although no information is given as to its date, nature, or contents. *Vansickle v. Axon et al.*, 535.

10. *Production of Documents — Deeds Relating to Plaintiff's Title.*—To deny the due execution of a deed sought to be protected, or to set up that it is forged, or to plead *non est factum*, does not give the defendant a right to have it produced on an affidavit of documents, where the deed is a part of the title to be proved at the hearing by the plaintiff; for the onus of proving it lies upon him, and if he fails he can go no further.

Frankenstein v. Gavin's Cycle Co., [1897] 2 Q. B. 62, followed. *Griffin v. Fawkes et al.*, 540.

11. *Patent of Invention—Action to Restrain Infringement—Denial of Right—Details of Business Transactions.*—In an action to restrain the defendants from selling a certain drug in violation of the rights of

the plaintiffs under a patent, and of the terms upon which the drug was sold to the defendants, and for damages for selling in violation of such rights and terms, and for damages for a trade-libel, the defendants admitted that they bought the drug, but not from the plaintiffs, and were selling it by their agents, and upon their examination for discovery stated fully their mode of procedure in buying and selling, but in their pleading they denied the plaintiffs' patent right:—

Held, that, there being a *bond fide* contest as to that right, the defendants should not, before the trial, be compelled to afford discovery of the details and particulars of such buying and selling, so as to disclose their and their customers' private business transactions. Such discovery should be deferred until after the plaintiffs should have established their right, even if a subsequent separate trial of the question of infringement should be necessary. *Dickerson et al. v. Radcliffe et al.*, 586.

12. *Production of Documents—Penalty—Double Tolls—R. S. O. ch. 160, sec. 42.*—The double tolls imposed by sec. 42 of the Timber Slide Companies Act, R. S. O. ch. 160, for false statements, are imposed by way of punishment, and not as compensation; and therefore an action to recover such double tolls is an action for a penalty, in which discovery of documents will not be enforced. *Pickerel River Improvement Co. v. Moore et al.*, 287.

DISCRETION OF COURT.

See JUDGMENT, 6—PARTIES, 1.

DISCRETION OF JUDGE.

See COSTS, ETC., 10, 22.

DISCRETION OF JUDGE IN CHAMBERS.

See JURY NOTICE, 4.

DISCRETION OF LOCAL JUDGE.

See JURY NOTICE, 1.

DISCRETION OF LOCAL OFFICER.

See SOLICITOR AND CLIENT, 3.

DISCRETION OF MASTER IN CHAMBERS.

See PARTICULARS, 4.

DISCRETION OF SOLICITOR.

See COSTS, ETC., 3.

DISCRETION OF TAXING OFFICER.

See COSTS, ETC., 3.

DIVISION COURTS.

Garnishee Plaintiff—Application to Remove into High Court—Judgment against Primary Debtor only—R. S. O. ch. 51, sec. 79.—An application under sec. 79 of the Division Courts Act, R. S. O. ch. 51, to remove an action from a Division Court into the High Court will not lie after

judgment in the Division Court ; and this rule will be applied where the action in the Division Court is brought under sec. 185, the garnishee being a party to the proceedings from the beginning, if final judgment has been obtained against the primary debtor, even though the liability of the garnishee has not been determined.

Gallagher v. Bathie, 2 U. C. L. J. N. S. 73, applied and followed. *Re Brodericht v. Merner*, 264.

DIVISIONAL COURT.

Appeal to—Stay of Proceedings—Rule 799A (1484).]—A Divisional Court has jurisdiction to allow an appeal from the judgment of a trial Judge to be set down upon short notice of motion, and to stay proceedings pending the appeal. *Todd v. Rusnell*, 127.

DOWER.

Sum in Gross — Devolution of Estates Act — Creditors.]—Under the Devolution of Estates Act, land of an intestate was sold by the administrator, with the approval of the official guardian, and, by consent of the widow, freed from her dower, upon the footing that she was to get out of the proceeds of the sale a sum in gross in lieu of dower.

The estate was practically insolvent, and but little was left for the sustenance of the widow and children :—

Held, that, notwithstanding the opposition of creditors, the widow should be allowed a gross sum. *Re Rose*, 136.

See DEVOLUTION OF ESTATES ACT —PLEADING, 3.

EJECTMENT.

See COUNTERCLAIM — JUDGMENT, 1.

ELECTION.

See DEVOLUTION OF ESTATES ACT.

EQUITABLE EXECUTION.

See RECEIVER, 3, 4, 5.

EVIDENCE.

Prosecution for Indictable Offence — Foreign Commission — Order for — Use of Evidence — Criminal Code, sec. 683.]—An order for a commission, under sec. 683 of the Criminal Code, to take the evidence of any person residing out of Canada who is able to give material information relating to an indictable offence, or to any person accused thereof, may be made at any time after an information has been laid charging such offence, and such evidence may be used at any stage of the inquiry at which evidence may be given.

Decision of *MACMAHON, J.*, 16 P. R. 444, affirmed, but the order issued thereon varied. *Regina v. Verral*, 61.

See JUDGMENT, 3—PARTICULARS, 1

EXAMINATION.

See ACCOUNT—CONTEMPT OF COURT —DISCOVERY GENERALLY—EVIDENCE —INFANT, 1 — JUDGMENT DEBTOR, 1, 2, 3, 4—PLEADING, 2.

EXECUTION.

See ATTACHMENT OF DEBTS, 2—
RECEIVER, 3, 4, 5.

EXECUTORS AND ADMINISTRATORS.

Bequest to Charities—Next of Kin—Advertisement for—Payment into Court—Petition for Advice.]—A testator by his will directed that his executor should distribute his residuary estate amongst churches and charities, or otherwise as he might think fit. The executor advertised for heirs and next of kin of the testator without result, and then paid into Court the money representing the residue.

Upon a petition under R. S. O. ch. 110, sec. 37, for the advice of the Court as to the construction of the will and as to further advertising for next of kin, the Court refused to make any order, in the absence of any of the heirs or next of kin. *Re Harley's Estate*, 483.

See ADMINISTRATION, 1, 2—COSTS, ETC., 13—TRUSTEE.

FEES.

See REFEREE.

FINAL JUDGMENT, AMENDMENT AFTER REFUSED.

See AMENDMENT, 3.

FOREIGN COMMISSION IN CRIMINAL CASE.

See EVIDENCE.

FOREIGN DEBT.

See INTERPLEADER, 3.

FOREIGN TUTRIX.

See INFANT, 2.

GARNISHMENT.

See ATTACHMENT OF DEBTS, 3.

GOOD DEFENCE.

See COSTS, ETC., 39—JUDGMENT, 7, 12.

INDEMNITY.

Third Party—Breach of Contract—Rule 328.]—Rule 328 (1313) applies only to claims to indemnity as such, either at law or in equity, and does not apply to a right to damages arising from breach of contract, the latter being a right given by law in consequence of the breach of the contract between the parties, while the former is given by the contract itself.

Birmingham and District Land Co. v. London and North-Western R. W. Co., 34 Ch. D. 261, followed.

Page v. Midland R. W. Co., [1894] 1 Ch. 11, distinguished.

And where an action was brought against lessees of a road for a declaration that they had no right to exact tolls, etc., and the defendants claimed to be indemnified by their lessors upon the ground that the latter had warranted their title to the road by the lease:—

Held, not a case in which leave should be given to issue a third party notice. *Payne v. Coughell et al.*, 39.

See COSTS, ETC., 4.

INFANT.

1. *Sale of Land—R. S. O. ch. 137, sec. 3—Dispensing with Examination.*—An order was made under R. S. O. ch. 137, sec. 3, for a sale of infants' lands at a named price, such of the infants as were over fourteen having been examined before a referee and having given their consent, and the remaining infant, who was under fourteen, having been produced before the referee, who certified with regard to her in the manner directed by the Rules, but the sale was not carried out.

A subsequent offer for the lands at a lower price having been received, an order was made for a sale at that price, the circumstances being such as to shew that it was in the interest of the infants; and their further examination was dispensed with, upon its being shewn that they were out of the Province, and that they were satisfied to accept the price offered. *Re Bennett Infants*, 498.

2. *Insurance Moneys—Payment into Court—Foreign Tutrix—Payment out—Trustee—60 Vict. ch. 36, secs. 155, 157 (O.).*—The provisions of secs. 155 and 157 of the Ontario Insurance Act, 60 Vict. ch. 36, provide a special mode for dealing with the shares of infants in insurance moneys, and exclude the application of the ordinary rules of law so far as inconsistent therewith.

And therefore a tutrix of infants duly appointed in the Province of Quebec is not entitled *qua tutrix* to moneys of the infants paid into Court under sec. 157 of the Act; but she may, under sec. 155, sub-sec. 2, be appointed a trustee of the fund

and receive it, upon giving proper security. *Re Berryman*, 573.

See COSTS, ETC., 14.

INSOLVENT PLAINTIFF.

See COSTS, ETC., 22, 26, 37.

INSURANCE.

See INFANT, 2.

INTEREST.

See JUDGMENT, 9, 10.

INTERLOCUTORY ORDER.

See JUDGMENT, 12.

INTERPLEADER.

1. *Bailees—Right to Order—Inability to Deliver Specific Property—Claim for Unliquidated Damages.*—Where grain was shipped over a railway under a contract which provided that it might be deposited in the railway company's elevators in common with other grain of like grade, and at its destination was claimed by the indorsee of the bill of lading, and also by an investment company claiming under a mortgage from the shipper, an interpleader order was made, upon the application of the railway company as carriers or bailees, notwithstanding that the specific grain could not be delivered, owing to its having been mixed with other grain in the elevator, as permitted by the contract, and notwith-

standing that the investment company's claim was, as contended, one for unliquidated damages for conversion of the grain.

Attenborough v. St. Katharine's Dock Co., 3 C. P. D. 450, followed. *Re Canadian Pacific R. W. Co. and Carruthers et al.*, 277.

2. *Jurisdiction—Foreign Claimants—Fund Payable in Foreign Country.*]—Under an agreement with respect to a mining property in this Province, a certain royalty was payable in a foreign country to foreigners residing therein, by a person also residing therein, but was claimed by another person in the jurisdiction:—

Held, upon an application for an interpleader order, that the Court had no power to direct foreigners to come within its jurisdiction to defend their right to the fund. *Re Benfield and Stevens et al.*, 300.

3. *Jurisdiction—Mining Agreement—Construction—Lease or License—Foreigners—Foreign Debt.*]—Under an agreement with respect to a mining property in this Province, payment was to be made in a foreign country to foreigners residing therein, being second mortgagees in possession, by a person also residing therein, of a sum of money for each ton of ore mined by him. A large sum due under the terms of this agreement was claimed by the payees named in it, and also by the first mortgagee of the property, who was in the jurisdiction:—

Held, that the agreement was a mere license to mine, not conferring an exclusive possession of the property, and a mere agreement for the sale and purchase of the ore when mined; and that the first mortgagee had no right of action for the money,

but, at the most, only a claim for unliquidated damages for the wrongful removal of ore; and the licensee was not entitled to an interpleader order:—

Held, also, affirming the decision of the Master in Chambers, 17 P. R. 300, that the Court had no jurisdiction to compel foreigners to come here with their claim and litigate it, the debt in question having no existence here.

Credits Gerundeuse v. Van Weede, 12 Q. B. D. 171, distinguished. *Re Benfield and Stevens et al.*, 339.

See COSTS, ETC., 27—JUDGMENT DEBTOR, 2.

IRREGULARITY.

See JURY NOTICE, 4—NOTICE OF TRIAL, 1, 2—SERVICE OF PAPERS.

JOINDER OF CAUSES OF ACTION.

See PARTIES, 3, 4, 6—PLEADING, 3.

JUDGMENT.

SUMMARY JUDGMENT, No. 7 *et seq.*

1. *Recovery of Land—Ancillary Claim—Joinder of Causes of Action—Motion for Judgment.*]—The plaintiff, without leave, indorsed his writ of summons with a claim for recovery of land and to set aside a conveyance. The writ was personally served, and the defendant not appearing, the plaintiff delivered a statement of claim, and, on default of defence, moved the Court for judgment. It appeared from the statement of claim that the setting

aside of the conveyance mentioned in the indorsement was sought by the plaintiff as a part of what was necessary to establish his title:—

Held, following *Gledhill v. Hunter*, 14 Ch. D. 492, that the action was to be treated as one for the recovery of land merely, in which judgment for default of appearance could have been entered without a motion; or, if not, that the plaintiff had improperly joined another claim with a claim for the recovery of land, without leave; and in either case the motion must fail. *May v. Drummond*, 21.

2. *Power of Judge to Vary—Costs.*]—The judgment of the trial Judge, not drawn up or entered, but indorsed upon the record, was in favour of the plaintiffs against all three defendants with costs, but was afterwards reversed as to two defendants by a Divisional Court. Subsequently, the other defendants moved the trial Judge to vary his judgment against them as to costs in accordance with what they considered should have been the judgment, had it been against them alone, and in favour of the other defendants, they being administrators, and an administration order having been made before the trial. The judgment, as pronounced, expressed precisely what the trial Judge intended; there was no clerical error, inadvertence, or oversight:—

Held, that the Judge had no power to vary his judgment. *Port Elgin Public School Board v. Eby et al.*, 58.

3. *Petition to Open up—New Evidence—Forum—Rule 782.*]—An application to open up a judgment on the ground of newly discovered

material evidence is provided for by Rule 782, and is properly made in Court to the Judge who tried the action, and is a proceeding in the cause. *Armour v. Merchants Bank of Canada*, 108.

4. *Appearance—Default—Tender—Notice.*]—On the day after the last day for appearance to a specially indorsed writ, the plaintiffs' solicitor attended before the officer of the Court to enter judgment for default, and while the latter was engaged in entering it, but before the stamps had been affixed, the defendant's solicitor came in with an appearance, which he tendered to the officer, informing him what it was. The officer, however, disregarded the appearance, and completed the entry of the judgment:—

Held, per *ARMOUR*, C. J., that the judgment was regular; for the officer, being seized of the business of entering the judgment, was not obliged to give it up to attend to the appearance.

Per FALCONBRIDGE, J., that the appearance, if received after the time limited, and without the notice required by Rule 281, would be something which the plaintiffs' solicitor would not be bound to regard, if he had made search in due time and found no appearance.

Per STREET, J., that by the tender of the appearance in the presence of the plaintiffs' solicitor, the officer was stayed in his right to enter judgment, and the judgment which he proceeded to enter was irregular; and he could not proceed again to enter judgment, even if no notice of appearance were served, until the time for service, that is the whole of the day of appearance, had expired. *Smith et al. v. Logan et al.*, 121.

5. *Appearance—Default—Tender—Notice—Irregularity—Motion for Judgment.*—Until the law stamps have been attached to or impressed upon the paper upon which a judgment is drawn up, there is no complete, effective, or valid judgment; and an appearance tendered after all the work of signing judgment for default has been completed, except the attaching of the stamps, should be received and entered.

Where an appearance, though tendered before, is not entered by the officer until after judgment, it cannot become an effective appearance until after the judgment has been set aside; and therefore the defendant cannot be said to be in default for not giving notice of appearance on the day on which it is entered, pursuant to Rule 281.

Where the plaintiffs insist upon the regularity of a judgment as a judgment in default of appearance, they are not in a position to take the alternative and inconsistent course of moving for judgment under Rule 739, treating the appearance as regular.

Where an appearance is entered after the last day for appearance but before judgment, the defendant has the whole of the day on which it is entered to give notice of the appearance under Rule 281.

Decision of the Court below, 17 P. R. 121, reversed. *Smith et al. v. Logan et al.*, 219.

6. *Judgment by Default—Setting Aside—Discretion—Terms—Defence—Merits—Rule 796.*—Under Rule 796 the Court has a discretion to set aside any judgment by default upon proper terms. Where such judgment is a final one, the Court is not in a position to exercise a discretion, unless the defendant shews at least

some such plausible defence as he would have to shew on resisting a motion for judgment under Rule 739. The Court will not try the defence so asserted, but affidavits may be received, or the defendant may be cross-examined upon his own, for the purpose of enabling the Court to determine how far there is a *bond fide* defence of the nature of that set up; and, a *fortiori*, his application may be met by documents under his own hand, not explained or answered, shewing that such defence is non-existent.

Order of a Divisional Court affirmed. *Bourne et al. v. O'Donohoe*, 522.

7. *Summary Judgment—Rule 739—Unconditional Leave to Defend.*—Rule 739 was made to prevent defences being set up against good faith for the mere purpose of gaining time. Where the defendant shews a good defence, he should be allowed to defend unconditionally.

Upon a motion for summary judgment under that Rule, in an action upon the covenant for payment in a mortgage, the defendant swore that he had a good defence on the merits, and that the mortgage was signed by him on the express understanding that he was not to be personally liable. This was supported by the affidavit of another person; and it also appeared that the blanks in the printed form of covenant contained in the mortgage had not been filled up:—

Held, that the defendant should have unconditional leave to defend.

Judgment of *BOYD, C.*, reversed. *Munro v. Orr*, 53.

8. *Promissory Note—Unconditional Leave to Defend.*—On a motion for summary judgment under Rule

739 in an action upon a promissory note, one of the defendants gave facts on affidavit shewing that the note was without consideration, invalid, and fraudulent as to the first holders, and stated his belief that the plaintiffs were suing on behalf of the first holders and had notice of the circumstances invalidating the note, but stated no facts as to such notice :—

Held, that the defendant should have unconditional leave to defend. *Farmers' Bank v. Sargant et al.*, 67.

9. *Writ of Summons—Special Indorsement—Goods Sold—Promissory Notes—Status of Plaintiffs—Affidavits—Amendment—Compound Judgment.*—Since the Bills of Exchange Act, 1890, interest on an overdue promissory note may be specially indorsed for, and may be simply claimed as “interest,” meaning interest at the statutory rate from maturity, which is now given as liquidated damages.

McVicar v. McLaughlin, 16 P. R. 450, followed.

It appeared by the writ of summons that one of the two plaintiffs sued as liquidator of a company, the other plaintiff being also a company :—

Held, that an indorsement “for goods sold and delivered during the year 1894 to the defendant by the O. C. Co., whereof the plaintiff C. is liquidator, \$353,” was a good specially indorsed claim on the part of C.; and an indorsement on promissory notes made by defendant, giving dates, amounts, and times when payable, and adding, “and assigned to the L. H. C. Co., one of the plaintiffs herein,” was a good claim specially indorsed as to the L. H. C. Co., though the way in which that company became assignee was not de-

tailed, there being no suggestion that they were not the legal holders.

Upon a motion for summary judgment under Rule 739 it appeared by affidavits that the plaintiff company were mortgagees of the claims, and the liquidator transferee subject to the co-plaintiffs’ claims :—

Held, that the affidavits shewed that the special indorsement was not in conformity with the facts, and therefore failed to verify it, and no amendment could be permitted upon the motion; nor could judgment be given, in accordance with the special indorsement, as to one part in favour of the liquidator, and as to the other in favour of the company.

MEREDITH, J., dissenting. *Clarkson et al. v. Dwan*, 92.

10. *Writ of Summons—Special Indorsement—Interest—Promissory Notes—Amendment.*—The indorsement of a writ of summons by which sums were claimed for interest upon promissory notes largely in excess of anything which could possibly be due except by virtue of some special contract, which was not alleged :—

Held, not a good special indorsement.

McVicar v. McLaughlin, 16 P. R. 450, distinguished.

Held, also, BURTON, J. A., dissenting, that the special indorsement was bad, and no amendment could be permitted, for the reasons given in the Court below, reported *ante* 92. *Clarkson et al. v. Dwan*, 206.

11. *Rule 739—Special Appearance—Defence of Want of Jurisdiction—Judicature Act, 1895, sec. 124—Absence of Defence on the Merits.*—Action upon a foreign judgment. Both plaintiff and defendant resided out of the jurisdiction; neither of them was a British sub-

ject; and the cause of action upon which the judgment was recovered arose out of Ontario. The plaintiff's right, if any, to sue in this Province depended upon sec. 124 of the Judicature Act, 1895. The defendant entered a special appearance, and raised, by pleading, the question of jurisdiction.

Upon an appeal from an order affirming an order refusing summary judgment under Rule 739 :—

Held, that, although the defendant failed to shew that he had a good defence to the action on the merits, and disclosed no facts that would have entitled him to defend in an ordinary action, yet the discretion exercised below should not be interfered with, having regard to the special nature of the jurisdiction conferred by sec. 124, and the provision requiring, even where no appearance is entered, the plaintiff's claim to be proved before he obtains judgment. *Campau v. Randall*, 243.

12. *Rule 739—Defence—Disclosure of Facts—Appeal—Judge in Chambers—Divisional Court.*—In answer to a motion by the plaintiffs for summary judgment under Rule 739 in an action upon a promissory note made by the defendant in favour of a trading company and indorsed by them to the plaintiffs, whose manager swore that they were the holders thereof in due course for value, the defendant made an affidavit in which he stated that he had never received any consideration for the note; that he made it for the accommodation of the company; that he had heard the local manager of the plaintiffs say that the note was not discounted by them, but was simply left with them; that he believed the local manager was aware when he received the note that it was

an accommodation one, and was also aware of the arrangement entered into between the company and the defendant at the time the note was made; and that an accountant placed by the plaintiffs in charge of the books of the company was present when that arrangement was made. He did not state that the local manager had the requisite notice to affect the plaintiffs, nor the grounds of his belief that he had such notice; nor did he state that the accountant referred to had any other notice or knowledge of the agreement referred to; nor did he adduce any hearsay evidence in support of the defence attempted to be set up :—

Held, that the defendant had not shewn satisfactorily that he had a good defence on the merits, nor disclosed such facts as should be deemed sufficient to entitle him to defend.

An order of a Judge in Chambers, made upon appeal from an order of the Master in Chambers, allowing summary judgment under Rule 739 to be entered, is an interlocutory order, but an appeal lies from it to a Divisional Court. *Bank of Toronto v. Keilty*, 250.

13. *Rule 744—Application of—Special Ground for Relief—Fraudulent Preference.*—An unopposed application for summary judgment under Rule 744, made the day after service of the writ of summons, in an action against a trader upon a bill of exchange, was refused. It was sworn, among other things, that the defendant had fraudulently transferred his business and property to certain persons; but the Court considered that the plaintiffs would not be prejudiced by the action being allowed to proceed in the ordinary way.

Leslie v. Poulton, 15 P. R. 332.

and *Molsons Bank v. Cooper*, 16 P. R. 195, applied and followed. *Lake of the Woods Milling Co. v. Apps*, 496.

See AMENDMENT, 3—COSTS, ETC., 1—DIVISION COURTS—JURY—SERVICE OF PAPERS.

JUDGMENT DEBTOR.

1. *Examination — Answers — Gambling Transactions.*]—Upon a motion to commit a judgment debtor for unsatisfactory answers upon his examination, the Court should not be called upon to inquire into gambling transactions, that is, practically, to take an account to ascertain what money was made and subsequently lost in that way by the judgment debtor, so as to determine whether, arising therefrom, any profits remained as estate in the debtor's possession. *Harvey et al. v. Aikine*, 71.

2. *Examination of—Order for—Judgment for Costs—Interpleader Proceedings—Motion to Commit—Rules 926, 932, 1360—Concealment of Property.*]—An order under Rule 932 for the examination of a judgment debtor for costs in interpleader proceedings having been made upon hearing all parties, an objection that the Rule is not applicable to such proceedings cannot be raised on a subsequent application to commit.

The judgment debtor, upon hearing that judgment had gone or was about to go against her, turned all the property she had into money and sent it to a friend in a foreign country, where it remained, and upon her examination she refused or professed to be unable to give any information as to where it was. After she had had ample opportunity to become aware of her position, but had done

nothing towards satisfying the plaintiff's claim, an order was made for her committal to gaol for three months and for payment by her of the costs of the motion. *McKinnon v. Crowe*, 291.

3. *Examination.—Right to Issue Appointment for.*]—A judgment creditor is *prima facie* entitled to issue an appointment for the examination of his judgment debtor; and, upon a motion to commit the latter for refusal to be sworn, it is for him to shew affirmatively that the issue of the appointment was an abuse of the process of the Court. *Grant v. Cook*, 362.

4. *Rule 928—Examination Under —“Transfer” by Judgment Debtor.*]—A judgment debtor had made a transfer of his property, after the debt sued for was incurred, to a mortgagee of the land of his wife, which had the effect of giving a benefit to the wife by reducing the incumbrance:—

Held, that the judgment creditor was entitled to an order under Rule 928 for the examination of the wife as a person to whom the debtor had made a “transfer” of his property; but *quere* as to the scope of the examination. *Croft v. Croft*, 452.

JURISDICTION OF HIGH COURT OR JUDGE.

See ACTION, 1, 2—AMENDMENT, 4—ARBITRATION AND AWARD—ARREST, 2—JUDGMENT, 2—INTERPLEADER, 2, 3.

JURISDICTION OF JUDGE IN CHAMBERS.

See VENUE, 2.

JURISDICTION OF TAXING OFFICER.

See COSTS, ETC., 18.

JURY.

Findings—Failure to Answer Question—Effect of—Judgment—New Trial—Right to, without Motion for.]
—At the trial of an action for negligence causing the death of a servant of the defendants, the jury, in answer to questions, found that the defendants were guilty of negligence which caused the accident, and assessed the plaintiffs' damages, but disagreed as to and did not answer a question put to them as to whether the deceased, with knowledge of the danger, voluntarily incurred the risks of the employment :—

Held, that judgment could not, under these circumstances, be entered either for the plaintiffs or the defendants.

Decision of STREET, J., affirmed.

Held, also, that as soon as a decision was given, to which both parties yielded, that no judgment could be given for either of them on the findings, there was an end of the trial, and either party was at liberty to give a new notice of trial and again to enter the action for trial, as upon a disagreement of the jury, without moving to set aside the findings and for a new trial.

Decision of STREET, J., reversed.

McDermott v. Grout, 16 P. R. 215, approved.

Stevens v. Grout, *ib.* 210, overruled. *Faulknor et al. v. Clifford et al.*, 363.

See PLEADING, 1.

JURY NOTICE.

1. *Striking Out—Discretion—Local Judge—Powers of—Equitable Issues.*]
—A local Judge has jurisdiction, in an action brought in his own county, where the solicitors for all parties reside in such county, by virtue of sec. 185 (5) of the Judicature Act, 1895, to make an order under sec. 114 striking out a jury notice as a matter of discretion; and he may do so sitting in Chambers.

And where the issues raised in an action of ejectment were mainly equitable, and it appeared to be a case in which the Judge at the trial would dispense with the jury :—

Held, that the local Judge should have exercised his discretion and struck out the jury notice.

Semble, that where there are both legal and equitable issues on the record, in the absence of an order under sec. 114, a party has the right to have the legal issues tried by a jury.

Baldwin v. McGuire, 15 P. R. 305, commented on. *Fox v. Fox*, 161.

2. *Crown—Rule 364—Trial Judge.*]
—The Crown coming into the High Court of Justice is in the same position as the subject; and a Judge, on the application of the Crown, can make an order striking out a jury notice given by the defendants.

Rule 364 applied.

Per OSLER, J. A.—If before the trial the Court or Judge has ordered that the action may be tried without a jury the Judge presiding at the trial has no power to direct it to be tried by a jury. *Regina v. Grant et al.*, 165.

3. *Motion to Strike Out—Non-repair of Highway—Law Courts Act, 1896, sec. 5.*]
—In an action against a railway company and a city cor-

poration to recover damages for injuries sustained by the plaintiffs by being upset upon a street in the city owing to the heaping up of snow upon the side of the roadway, the plaintiffs in their statement of claim alleged that the corporation had permitted this to be done, and had thereby allowed the street to be out of repair and dangerous for travel :—

Held, that the action must be treated as one for non-repair of a street within the meaning of sec. 5 of the Law Courts Act, 1896 ; and a jury notice was therefore irregular and should be struck out.

It made no difference that the motion to strike out the jury notice was made by the railway company and not by the city corporation, as the latter appeared and supported the motion. *Barber et ux. v. Toronto Railway Co., et al.*, 263.

4. *Striking Out—Legal and Equitable Issues — Irregularity — Discretion.*—Where both legal and equitable issues are raised by the pleadings, a jury notice cannot be regarded as irregular.

Baldwin v. McGuire, 15 P.R. 305, distinguished.

Where it is apparent that an action should be tried without a jury, a Judge in Chambers will strike out the jury notice as a matter of discretion. *Toogood v. Hindmarsh*, 446.

LACHES.

See COSTS, ETC., 21 (a).

LANDLORD AND TENANT.

See ATTACHMENT OF DEBTS, 1.

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LEAVE TO APPEAL.

See APPEAL, 3, 4, 6, 7, 10.

LEAVE TO DEFEND.

See JUDGMENT, 7, 8.

LEGAL OR EQUITABLE ISSUE.

See JURY NOTICE, 1, 4.

LIBEL.

See COSTS, ETC., 21, 32—PLEADING, 2.

LIEN OF SOLICITOR.

See COSTS, ETC., 16.

LIQUIDATOR.

See COSTS, ETC., 7, 15.

LOCAL JUDGE, DISCRETION OF.

See JURY NOTICE, 1.

MARRIED WOMAN.

See COSTS, ETC., 19.

MARSHALLING.

See PARTIES, 2.

MASTER'S OFFICE.

See ACCOUNT.

MISTAKE.

See AMENDMENT, 4.

MORTGAGE.

Notice of Sale—Abandonment—Costs—Action on Covenant—Motion for Summary Judgment.]—After the issue of the writ of summons and service of a notice of motion for summary judgment in an action upon the covenant for payment contained in a mortgage deed, the plaintiff, without the leave required by R. S. O. ch. 102, sec. 30, served notice of exercising the power of sale contained in such deed. Before the hearing of the motion, the plaintiff gave notice of abandonment of his notice of sale and of all costs in respect thereof:—

Held, that the effect of the notice of sale was to give the defendant time within which to pay off what was claimed, and, unless the defendant was willing to release the plaintiff, he was bound by the notice; and the motion for judgment could not be entertained; but the object of R. S. O. ch. 102, sec. 30, would be fully attained by directing that the motion should stand over until after the expiration of the thirty days mentioned in the notice. *Lyon v. Ryerson*, 516.

MORTGAGE ACTION.

See COSTS, ETC., 1—COUNTERCLAIM.

MORTGAGE, SALE UNDER.

See CREDITORS' RELIEF ACT.

MORTGAGOR AND MORTGAGEE.

See ATTACHMENT OF DEBTS, 1—PARTITION.

MOTION TO COMMIT.

See JUDGMENT DEBTOR, 2.

MUNICIPAL ELECTIONS.

Quo Warranto—Withdrawal of Relator—Intervention—Substitution.]—Where the relator in a proceeding in the nature of a *quo warranto* under the Consolidated Municipal Act, 1892, desires to withdraw, the Court has no power, under the statute or otherwise, to compel him to go on against his will, nor to substitute a new relator.

The power given by sec. 196 is to substitute a new defendant, not a relator. *Regina ex rel. Masson v. Butler*, 382.

NEW DEFENCE.

See AMENDMENT, 2.

NEW EVIDENCE.

See JUDGMENT, 3.

NEW TRIAL.

See JURY.

NEXT FRIEND.

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NOMINAL PLAINTIFF.

See COSTS, ETC., 22, 37.

NONSUIT.

See COSTS, ETC., 5.

NOTARY PUBLIC.

See AFFIDAVIT.

NOTICE.

See ACCOUNT.

NOTICE OF APPEARANCE.

See JUDGMENT, 4, 5.

NOTICE OF SALE.

See MORTGAGE.

NOTICE OF TRIAL.

1. *Irregularity—Close of Pleadings.*—A pleading in reply, which was more than a simple joinder of issue, was served by the plaintiffs on the 30th June, 1896. No further or other pleading having been delivered, and no extension of time for further pleading having been granted, the plaintiffs, on the 4th September, 1896, between three and four in the afternoon, served a notice of trial for the 14th September, 1896 :—

Held, irregular. *Piper et al. v. Benjamin*, 267.

2. *Irregularity—Close of Pleadings—Order Staying Proceedings—Chambers Motion—Reference to Trial*

Judge — Order — Judgment — Appeal.—On the 21st March, 1896, the defendant appeared, delivered a defence, and served an order for security for costs, which imposed a stay of proceedings. On the 2nd October, 1896, the plaintiff complied with the order by filing a bond, and on the 3rd October gave notice of trial :—

Held, that the notice of trial was irregular, the pleadings not being closed when it was given.

A motion made in Chambers by the defendant to set aside the notice of trial was referred to the Judge at the trial, who dismissed it. The defendant thereupon withdrew, and the action was tried in his absence and judgment given for the plaintiff :—

Held, that the Judge, when disposing of the motion, was sitting and acting as a Judge of Assize, and that this and the trial of the cause might properly be deemed one proceeding ; and one appeal, comprehending all, was sufficient. *Campau v. Randall*, 325.

3. *Jury Sittings—Non-jury Sittings — Default — Judicature Act, 1895, sec. 88—Rule 647.*—Where an action is to be tried without a jury, and two Spring or Autumn Sittings have been appointed at the place of trial, one for the trial of actions with, and the other without a jury, the plaintiff, although by sec. 88 of the Judicature Act, 1895, he can have his action tried at the jury sittings, is not in default under Rule 647 by reason of his not giving notice of trial therefor, where the non-jury sittings, for which he intends to give notice of trial, is to be held at a later date. *Leyburn v. Knoke—Leyburn v. Herbort*, 410.

OFFICIAL REFEREE.*See* VACATION.**PARTICULARS.**

1. *Demand — Compliance — Restriction.*]—Where a party complies with a demand for particulars of his claim, he will be restricted at the trial to the particulars given by him, without any order for the purpose. *Young v. Erie and Huron R. W. Co.*, 4.

2. *Slander.*]—In an action of slander the defendant has a right to the fullest particulars the plaintiff can furnish as to the place where, the time when, and the person to whom the words alleged were uttered; and also to full particulars of the names of the persons who have ceased business dealings with the plaintiff on account of the slander.

Shifty and uncertain particulars, such as are rendered meaningless and evasive by saying "among others" and "some of the persons," are to be discouraged.

The plaintiff is bound to give definite information, so far as he can, and to stop there; if further information comes to his knowledge, he can obtain leave to amend.

The defendant is entitled to particulars of slanderous statements alleged merely as matters shewing express malice or in aggravation of damages. *Muller v. Gerth*, 129.

3. *Pleading — Fire Insurance — Proofs of Loss — False and Fraudulent Statements.*]—The defence to an action to recover the loss alleged to have been sustained by the plaintiffs by the destruction by fire of property insured by the defendants was

that the plaintiffs' claim was vitiated by the 15th statutory condition to which the defendants' policies were subject, because of the following false and fraudulent statements in a statutory declaration forming part of the proof of loss: (1) that the fire originated at a specified time from the embers of a previous fire upon the same premises; (2) that the fires were not caused by the wilful act or neglect, procurement, means, or contrivance of the manager or any officer of the plaintiffs; (3) that the schedules attached to the declaration contained as particular an account of the loss as the nature of the case permitted, and that such account was just and true.

Upon an application for particulars:—

Held, that the plaintiffs were entitled to know what acts of omission or commission the defendants intended to charge the plaintiffs' manager with as constituting the negligence imputed to him, and in what way it was charged that the fires were caused by his procurement, means, or contrivance.

2. That as to the origin of the fire, the statement that it did not occur at the time and in the way stated, and that the untrue statement was made with intent to defraud the defendants, was sufficient information to give the plaintiffs, and the defendants could not be required to give further particulars without disclosing their evidence merely.

3. Nor should further particulars be required as to how the declaration that the fire was not caused by the wilful act of the manager was false and fraudulent. The statement that the fire was caused by his wilful act was sufficient.

4. That as to the alleged falsity

and fraud of the declaration with respect to the extent of the loss, it was sufficient for the defendants to say that the plaintiffs had overstated by a specified sum the loss on the whole of the articles insured, without saying by how much the plaintiffs had overstated the loss on each of the classes of articles. *Katrine Lumber Company v. Liverpool and London and Globe Insurance Company*, 318.

4. *Application for—Close of Pleadings—Discretion.*—It is only in exceptional cases that particulars are ordered after the close of the pleadings.

And where, in an action by the plaintiff against his former partner and another, for conspiracy to ruin the business of the firm, the defendant partner set up the defence that the business was ruined by the wrongful withdrawals and overdrafts of the plaintiff and by his mismanagement, negligence, fraud, and embezzlement, and certain particulars were given thereunder, as to which the defendant swore that they were given with as much detail as he could command, shewing how the business had been conducted and the shortages which had arisen, for which he alleged the plaintiff was responsible as the acting partner:—

Held, that the discretion exercised in Chambers in refusing to order further particulars, after issue joined and notice of trial given by the plaintiff, should not be interfered with. *Smith v. Boyd et al.*, 463.

See PLEADING, 2.

PARTIES.

1. *Third Party Procedure—Relief Over—Amendment—Time—Rules 328-332—Order—Discretion of*

Court—Appeal.—An action was brought against two defendants, one of whom suffered judgment by default; the plaintiff proceeded against the other, claiming by virtue of an assignment from the first of his cause of action against the second, which was in the nature of a claim for indemnity against liability for the claim on which the judgment by default had been suffered. At the trial the action was dismissed against the second on the ground that the assignment was inoperative. Upon an appeal by the plaintiff to a Divisional Court, an order was made directing that, notwithstanding the assignment, the first defendant should be allowed to amend the pleadings by claiming over against the second defendant, who was to be allowed also to amend, and further evidence was to be taken, if necessary:—

Held, not a mere discretionary order, but one from which an appeal lay.

Hately v. Merchants' Despatch Transportation Co., 12 A. R. 640, followed.

2. That the order could not be sustained under Rules 328-332 (1313) or otherwise, as it was made at too late a stage, and upon the application of the plaintiff only. *Boulton v. Cochran et al.*, 9.

2. *Action to Realize Charge on Land—Subsequent Incumbrancers—Master's Office—Right to Vary Judgment—Amount of Charge—Marshalling.*—Legacy to plaintiff of a sum equal to one-fifth of their value charged upon two parcels of land, A. and B. Devise of both parcels subject to the legacy. The extent of the devisee's interest under the will in parcel A. uncertain. Agreement between the devisee and plain-

tiff fixing value of legacy at \$400, not registered. The devisee mortgaged both parcels separately to different mortgagees, who registered. Plaintiff proceeded against the devisee alone for the sale of parcel B. only for payment of the legacy as fixed by agreement, and obtained judgment by default with reference as to incumbrances.

Upon motion by the incumbrancers upon parcel B., who were added as parties in the Master's office, to set aside or vary the judgment:—

Held, reversing the decision of STREET, J., that there was no necessity, and no right on the part of the added parties, to alter or vary the judgment to enable them to question and reduce the amount of the charge fixed thereby as between the plaintiff and the defendant; and that as between them and the plaintiff the value of the charge was open in the Master's office, in the absence of notice.

2. That the added parties had the right of marshalling; but the plaintiff, having obtained a regular judgment, had a superior equity to theirs, and they had no right to deprive her of it, nor to involve her in the expense of construing the testator's will, and ascertaining what rights of the defendant in parcel A. were subject to the charge. If they chose they could redeem the plaintiff, and, standing in her place, at their own expense have recourse to the west half. *Rutherford v. Rutherford et al.*, 228.

3. *Causes of Action—Joinder—Rule 300.*]—Two plaintiffs joined in an action a claim by one for damages for the wrongful interference of the defendants with him in the completion of a building, and for assaulting and arresting his servant and

co-plaintiff, and a claim by the other for damages for the same assault and arrest:—

Held, that each was a separate and distinct cause of action, and could not properly be joined, under Rule 300.

Smurthwaite v. Hannay, [1894] A. C. 494, and *Carter v. Rigby*, [1896] 2 Q. B. 113, followed.

Booth v. Briscoe, 2 Q. B. D. 496, distinguished. *Mooney et al. v. Joyce et al.*, 241.

4. *Causes of Action—Joinder.*]—The statement of claim alleged that two of the defendants, by fraudulent representations, induced the plaintiffs to enter into an agreement for the purchase of a horse; that one of these defendants, in the name of his partner, a third defendant, having agreed to become a co-partner with the plaintiffs in the purchase, made a fraudulent profit by way of commission out of the transaction; that these three defendants transferred promissory notes, made by the plaintiffs with the intention of carrying out the transaction, to the fourth and fifth defendants, who had notice of the fraud; and claimed to have the agreement declared fraudulent and void and ordered to be cancelled; to have the notes declared void and ordered to be cancelled; or to have the first three defendants ordered to indemnify the plaintiffs against the notes; damages for the false representations; or that the defendants alleged to have received a commission should be ordered to account to the plaintiffs therefor.

After the parties had been for more than six months at issue, the defendants applied to strike out the statement of claim as embarrassing:—

Held, that the transaction com-

plained of was one that should be investigated in all its parts on the one record, and that no peculiar difficulty would arise in dealing with it as a whole, and then following such details as might be pertinent. *Crerar et al. v. Holbert et al.*, 283.

5. *Misjoinder of Plaintiffs—Rule 324—Striking Out—Leave to Bring New Actions—Ante-dating Writs—Terms—Statute of Limitations.*]—Upon the defendants' application, in a case of misjoinder of plaintiffs, under Rule 324, the usual order is that all proceedings be stayed till election is made as to the plaintiff who shall proceed, and that the names of the others be struck out.

But there is no power to direct that the rejected plaintiffs shall be allowed to issue writs of summons for their respective causes of action against the defendants *nunc pro tunc* as of the date when the writ in the original action was issued, there being no power to alter the date of the process.

Clarke v. Smith, 2 H. & N. 753, *Nazer v. Wade*, 1 B. & S. 728, and *Doyle v. Kaufman*, 3 Q. B. D. 7, 340, followed.

Nor can a term be imposed that in the new actions the defendants be restrained from setting up the Statute of Limitations.

Smurthwaite v. Hannay, [1894] A. C. 494, 506, specially referred to. *Huthnance et al. v. Township of Raleigh*, 458.

6. *Misjoinder of Defendants—Distinct Causes of Action.*]—The plaintiff's claim as against her husband, one of the defendants, was for specific performance of an antenuptial contract to transfer to her certain property of various kinds, and as against the several other

defendants, to whom the husband had made transfers of such property, or in whose hands it was, for relief by way of declaration, cancellation, and order for payment:—

Held, that, although the plaintiff's right to each cause of action was historically connected with each of the others, that connection related only to her rights; the rights of each set of the defendants were as distinct as they were before the events which conferred upon the plaintiff the rights which she asserted; and such causes of action could not properly be joined in one action.

Smurthwaite v. Hannay, [1894] A. C. 494, and *Sadler v. Great Western R. W. Co.*, [1896] A. C. 450, followed. *Faulds v. Faulds et al.*, 480.

7. *Committeemen—Liability—Amendment—Co-contractors—Application to Add—Affidavit—Costs.*]—Where credit is given to an abstract entity such as a club, the creditor may look to those who in fact assumed to act for it and those who authorized or sanctioned that being done, at all events where he did not know of the want of authority of the agent to bind the club; *ROSE, J.*, dissenting.

Review of English cases on this subject.

The liability in such cases is not several, but joint.

By analogy to the old practice where a plea in abatement for non-joinder of co-contractors was pleaded, a defendant now moving to stay proceedings until the co-contractors are added as parties should shew by affidavit the names and residences of the persons alleged to be joint contractors whom he seeks to have added, and the same liability as to costs, in case persons are added who

turn out not to be liable, should be entailed upon him.

In an action begun against an unincorporated company, as a partnership, to recover a sum for costs paid by the plaintiffs, an order in Chambers allowing the plaintiffs to amend by adding as defendants certain members of the executive committee of the company, and to charge them in the alternative as personally liable by reason of their having sanctioned the arrangement between the plaintiffs and the association, was affirmed without prejudice to the defendants applying to add parties. *Aikins et al. v. Dominion Live Stock Association of Canada et al.*, 303.

See ADMINISTRATION, 1—AMENDMENT, 3—COSTS, ETC., 22—EXECUTORS AND ADMINISTRATORS—JUDGMENT, 9—RECEIVER, 5.

PARTITION.

Summary Application — Mortgagee.]—A mortgagee whose title has not been perfected by foreclosure or otherwise is not entitled to an order for partition or sale upon summary application under Rule 989. *Mulligan v. Hendershott et al.*, 227.

PARTNERSHIP.

See PARTIES, 7.

PAYMENT INTO COURT.

Defence—Payment Out—Election—Time—Con. Rules 632 et seq.—Appeal—Removal of Stay of Proceedings.]—In an action to recover money for services rendered, the

defendant pleaded that \$325 was more than an ample and sufficient payment; that he had before action paid the plaintiff \$25, and had always been ready and willing and was now ready and willing to pay him \$300 more; that before action he had tendered \$300 in payment of the services rendered, but the plaintiff refused to accept it; and the defendant brought \$300 into Court in satisfaction of all claims and demands of the plaintiff in this action:—

Held, that the defence was so framed that if the plaintiff had desired to take the money out of Court, he must have elected to do so before replying or before the expiration of the time for replying, as provided by Con. Rule 636, and must have taken it in satisfaction of all his claims in the action, and have filed and served a memorandum in accordance with Con. Rule 635. But, as he, instead of taking this course, proceeded with the action (in which he recovered more than \$300), the defendant was absolved from his offer, and the money remained in Court subject to further order; the defendant was entitled, in the absence of special circumstances, to have it remain to be dealt with when the case should be finally disposed of; and it was open to the defendant to contend upon appeal that the amount recovered should be reduced below \$300, notwithstanding the payment into Court, by the plaintiff's election not to take the money out at the appropriate time. *Denison v. Woods*, 549.

PAYMENT OUT OF COURT.

See CREDITORS RELIEF ACT—PAYMENT INTO COURT.

PENALTY.

See COSTS, ETC., 23—DISCOVERY, 12.

PENDING ACTION.

See APPEAL, 10.

PERSONA DESIGNATA.

See APPEAL, 1.

PHOTOGRAPHS.

See DISCOVERY, 8.

PLEADING.

1. *Defamation — Trade-libel — Action on the Case—Trial by Jury —Judicature Act, 1895, sec. 109.*]—An action for words written and published relating to articles of the plaintiffs' manufacture and the rights of the plaintiffs under certain letters patent by virtue of which they claimed a monopoly of the manufacture and sale of the articles, is not an action of defamation properly so called, but an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiffs, and does not come within sec. 109 of the Judicature Act, 1895, so as to be triable only by a jury, unless by consent. *Dickerson et al. v. Radcliffe et al.*, 418.

2. *Defamation — Trade-libel — Action on the Case—Particulars—Slander—Examination of Party.*]—The plaintiff, a tradesman, claimed damages for injury to his credit and business by reason of the defendant having sent certain hand-bills issued

by the plaintiff, advertising his business, to various wholesale creditors of the plaintiff, and having written and published letters to such creditors falsely and maliciously charging that the plaintiff was advertising his business and unduly forcing sales with the view of selling and disposing of his goods to defeat and defraud his creditors :—

Held, that the action was for libel, and not in case for disturbing the plaintiff in his calling, and the defendant was entitled to have the words of the alleged libel set out in the pleading.

Flood v. Jackson, [1895] 2 Q. B. 21, and *Riding v. Smith*, 1 Ex. D. 91, specially referred to.

The plaintiff also alleged that at a certain city, in a certain month and year, the defendant falsely and maliciously spoke and published of the plaintiff certain specified words :—

Held, that the defendant was entitled to some particulars as to the times when and the places where the defamatory words were used, and as to some of the persons in whose hearing they were alleged to have been spoken.

Winnett v. Appelbe, 16 P. R. 57, distinguished.

Held, also, that the plaintiff should have leave to examine the defendant before delivering particulars, in order to enable him to furnish them. *Robinson v. Sugarman*, 419.

3. *Statement of Claim—Matters Arising Pending Action—Joinder of Causes of Action—Recovery of Land—Assignment of Dower—Leave—Rule 341.*]—A plaintiff cannot set up in his statement of claim matters arising pending the action.

An action for assignment of dower, is an action for the recovery of land.

McCulloch v. McCulloch, 4 C. L. T. 252, followed.

Where leave is necessary under Rule 341 to join other causes of action with an action for the recovery of land, it must be obtained before the writ of summons is issued, unless under very exceptional circumstances. *McLean v. McLean et al.*, 440.

4. *Defamation—Defences—Fair Comment—Privilege—Mitigation of Damages—Confusion—Embarrassment.*]—The plaintiff should not be driven to spell out the defences set up in an action. He is entitled to have them set forth in such manner as will enable him, upon reading them, to form a fairly correct judgment as to their scope and meaning, and as to what is intended to be relied upon under them. And while the defendant in an action of defamation ought not to be shut out from setting up any matter which he may properly plead either in bar or by way of mitigation of damages, he should so arrange the paragraphs of his statement of defence as to group the separate defences of privilege and fair comment and the matters alleged in mitigation under their appropriate heads. *Dryden v. Smith* (No. 2), 505.

See AMENDMENT GENERALLY—COSTS, ETC., 30, 32—PARTICULARS, 3.

PRINCIPAL AND AGENT.

See PARTIES, 7.

PRIVILEGE.

See DISCOVERY, 4, 7, 8—PLEADING, 4.

PROCEDURE.

See APPEAL, 10—PARTIES, 1.

PRODUCTION.

See DISCOVERY GENERALLY—CONTEMPT OF COURT.

PROSECUTION, DISMISSAL FOR WANT OF.

See ACTION, 3—REVIVOR, 2.

PUBLIC OFFICER.

See COSTS, ETC., 30.

QUO WARRANTO.

See MUNICIPAL ELECTIONS.

RECEIVER.

1. *Administration Action—Status.*]—The right of a judgment creditor of a legatee or devisee under a will to bring an action for the administration of the estate of the testator is doubtful.

A receiver, appointed at the instance of a judgment creditor to receive the interest of the judgment debtor in the estate of his father for satisfaction of the judgment debt, was given leave to bring an action for administration, no opinion being expressed as to his status. *Mones & Co. v. McCallum*, 102.

2. *Ex Parte Order—Costs—Review.*]—After judgment a receiver may be appointed *ex parte* in case of emergency or where there is danger

apprehended in the disposal of property.

Re Potts, [1893] 1 Q. B. at p. 662, and *Minter v. Kent, etc., Land Society*, 11 Times L. R. 197, referred to.

And where *ex parte* orders were made in respect of two parcels of stock which the plaintiff feared might be disposed of if notice were given, and in both cases costs were given to the applicant:—

Held, that the disposition of the costs should not be reviewed on motion to continue the receiver.

McLean v. Allen, 14 P. R. 84, distinguished. *Stark et al. v. Ross*, 237.

3. *Equitable Execution—Share in Estate of which Execution Debtor is Administrator—Injunction.*—At the instance of execution creditors, a receiver was appointed to receive the debtor's share of his deceased wife's estate, of which he was the administrator; and an injunction was granted restraining him from transferring, incumbering, or dealing with his share. *Smith et al. v. Egan*, 330.

4. *Equitable Execution—Administration Action—Parties—Judgment Debtor—Addition of—Rule 324 (b).*—A receiver appointed by way of equitable execution has no greater rights of action than the person for whom he is receiver, and if the judgment creditor can not proceed to administer an estate in order to make available the interest of his judgment debtor as a beneficiary therein, no more can the receiver; nor can the Court compel the judgment debtor to help his creditor to recover the fruits of an adverse judgment, either by adding him without his consent as a co-plaintiff in an action brought by the receiver for administration—against doing which

Rule 324 (b) is conclusive—or by allowing the receiver to bring a new action in the name of the judgment debtor for the same purpose.

Stuart v. Grough, 14 O. R. at p. 257, and *McLean v. Allen*, 14 P. R. 291, not followed.

Allen v. Furness, 20 A. R. 34, *In re Potts*, 10 Mor. B. C. 52, and *Flegg v. Prentiss*, [1892] 2 Ch. 428, specially referred to.

McGuin v. Fretts, 13 O. R. 699, and *Bank of London v. Wallace*, 13 P. R. 176, distinguished. *Cameron v. McLean et al. Mones & Co.*, v. *McCallum*, 356.

5. *Equitable Execution—Right to Bring Actions—Parties—Judgment Debtor.*—A receiver appointed by the Court to aid a judgment creditor in recovering his claim, by receiving the judgment debtor's share in an estate which could not be reached by execution, after the refusal of the judgment debtor to allow the use of his name, was authorized, on giving security to him, to take proceedings in his name for the administration of the estate, and if necessary for the removal of the executor.

Decision of *Boyd, C.*, *ante* 356, reversed. *Mones & Co. v. McCallum et al.*, 398.

RECOVERY OF LAND.

See COUNTERCLAIM—JUDGMENT, 1—PLEADING, 3.

REFEREE.

Report—Payment of Fees.—Upon a reference under sec. 102 of the Judicature Act, the referee apportioned the amount of his fees between the plaintiffs and defendants according to the time occupied by

each upon the reference. The plaintiffs paid their share, but the defendants did not:—

Held, that the referee should issue his report to the plaintiffs without further payment by them, and look to the defendants for their share of his fees. *Brooks v. Georgian Bay Saw-Log Salvage Co. ; Rumley et al. v. Georgian Bay Saw-Log Salvage Co.*, 34.

REFERENCE.

See ADMINISTRATION, 1—VACATION
—REFEREE.

RELATOR.

See MUNICIPAL ELECTIONS.

REPORT.

See REFEREE.

RESIDENCE OF PARTY.

See DISCOVERY, 6.

REVIVOR.

1. *Order for, After Judgment—Motion to Set Aside Rule 622.*]—Order and decision of Street, J., 16 P. R. 219, refusing to set aside order of revivor affirmed. *Chambers v. Kitchen*, 3.

2. *Præcipe Order—Delay in Prosecution of Action—Change of Interests.*]—A statute passed in 1889 gave persons making certain claims a right to bring an action within a

year. The plaintiffs brought such an action within the year, but did not proceed with it, and no proceeding was taken by either party, after the delivery of the defence in June, 1890, until, one of the plaintiffs having died in January, 1895, the action was revived in February, 1896, by a præcipe order. In the meantime changes had taken place in the interests of the parties:—

Held, that the order should not be interfered with. The old practice had been superseded, and the defendants, not having moved to dismiss, were not entitled to complain of the action being revived. *Ardagh et al. v. County of York*, 184.

SEAL.

See AFFIDAVIT.

SEPARATE PROPERTY OF MARRIED WOMAN.

See COSTS, ETC., 19.

SERVICE OF PAPERS.

Posting up Copies—Rule 1330—Judgment—Irregularity.]—Where service of a statement of claim and notice of motion for judgment was effected, under Rule 1330, by posting up a copy of each in the office in which the proceedings were conducted:—

Held, that the posting up of one copy only for two defendants was not to be deemed service on either; and a judgment founded thereon was set aside as irregular. *Haacke v. Ward et al.*, 520.

SERVICE OUT OF JURISDICTION.

See AMENDMENT, 5 — WRIT OF SUMMONS, 1, 2.

SET-OFF.

See COSTS, ETC., 2, 11, 16, 19.

SETTING DOWN APPEAL.

See APPEAL, 9—DIVISIONAL COURT.

SETTLEMENT OF ACTION.

See ACTION, 1.

SHERIFF.

See ATTACHMENT OF DEBTS, 2.

SLANDER.

See COSTS, ETC., 39—PARTICULARS, 2—PLEADING, 2.

SOLICITOR AND CLIENT.

1. *Taxation of Bill — Appeal—Rules 848-851, 1226 (d), 1230, 1231.*—Upon an appeal by the solicitor from the decision of the Queen's Bench Division, 16 P. R. 423, rendered on appeal from the taxation of his bill of costs against his client, under the common order for taxation, the Court was divided in opinion as to one of the grounds of appeal, viz., that the appeal was not properly before the Court below :—

Held, per HAGARTY, C.J.O., that whether the appeal was or was not regularly before the Court below, it had jurisdiction to interfere to prevent a gross abuse. *Storer v. Johnson*, 15 App. Cas. 203, followed.

Per OSLER, J.A., that where what is sought by the appeal is the review of certain items of a solicitor's bill of costs against his client, the appeal is as from a Master's report under Rules 848-850 ; and this is the effect of Rule 1226 (d).

Per BURTON and MACLENNAN, JJ. A., that such an appeal is regulated by the same Rules and practice as apply to an appeal from a taxation of costs between party and party ; and the provisions of Rules 1230 and 1231 not having been complied with, an appeal could not be taken under Rule 851. *Re Robinson, a Solicitor*, 137.

2. *Special Journey—Authority—Ratification—Bill of Costs—Block Charge—Taxation—Items—Appeal—Certificate of Taxation.*—A solicitor acted for a municipal corporation as solicitor and sole counsel in a matter in litigation which was contested in the High Court, Court of Appeal, and Supreme Court of Canada. The municipal council passed a resolution authorizing an application for leave to appeal to the Privy Council, a copy of which was forwarded to the solicitor, who thereupon, without specific instructions, proceeded to England for the purpose of obtaining leave, and while there drew upon the treasurer of the corporation a bill for a part of his expenses, which was honoured :—

Held, that the resolution, the payment on account of expenses, and other acts of ratification, without protest as to the solicitor's course, were sufficient authority to him ;

and he was entitled to tax against the corporation his expenses in transit and in residence in England, an allowance for services rendered in England as solicitor and counsel, and a *per diem* charge for waiting, having regard to his being absent from his own business.

The solicitor made a block charge of \$1,400 for his services, time, and expenses:—

Held, that it should be resolved into details and taxed in items.

An appeal from the certificate of taxation of a bill of costs between solicitor and client is to the Court, as if it were an appeal from a Master's report. *Re Mowat, a Solicitor*, 180.

3. *Costs—Taxation—Discretion of Local Officer—Increased Counsel Fees.*—Solicitor and client taxations are distinct from party and party taxations, both as to the scope of the inquiry and as to the powers of the officer to whom the reference is made, in regard to the allowance of items. In solicitor and client taxations there is no power of intervention on the part of the taxing officer at Toronto in order to obtain an increase in amount under such items in the Tariff as 104, 145, 150, 153; but the officer charged with the reference has power to exercise the discretion recognized by the Tariff in increasing the amount chargeable for certain services ordinarily exerciseable by the officer at Toronto in party and party taxations. *Re Macaulay, a Solicitor*, 461.

See COSTS, ETC., 3, 6, 8, 20, 21 (a), 28, 36—DISCOVERY, 7.

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See AMENDMENT, 5.

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TAXATION.

See COSTS, ETC., 8, 11, 19—SOLICITOR AND CLIENT, 1, 2, 3.

THIRD PARTIES.

See COSTS, ETC., 4—INDEMNITY—PARTIES, 1.

TIME.

See APPEAL, 5, 8, 9—ARBITRATION AND AWARD—COSTS, ETC., 8, 23—JUDGMENT, 5—JUDGMENT DEBTOR, 2—PARTIES, 1—PAYMENT INTO COURT.

TRIAL JUDGE.

See JURY NOTICE, 2—NOTICE OF TRIAL, 2.

TRUSTEE.

Executor — Removal — Summary Application.]—The Court will not upon a summary petition, or otherwise than in an action, remove a trustee or an executor *in invitum*. *Re Davis's Trust*, 187.

See INFANT, 2.

VACATION.

Reference — Official Referee.]—Every legal proceeding which may properly be taken out of vacation may with equal propriety be taken during vacation, unless something to the contrary can be found in some statute or Rule of Court.

An official referee may proceed with a reference during vacation. *Marples v. Rosebrugh*, 104.

VENUE.

1. *Change of—Convenience—Preponderance.*]—Upon appeal by the defendant, in an action alleging fraud in the adjustment of partnership accounts and for an account, from an order of a Judge affirming an order of a Master refusing to change the venue from Toronto to Sault Ste. Marie, the Court was divided in opinion.

Per ARMOUR, C. J.—The venue should be changed, because the action could be more fitly and conveniently tried at Sault Ste. Marie.

Per STREET, J.—The defendant had not shewn so great a preponderance of convenience in favour of the change as was necessary under the authorities, especially in view of the previous refusals by the Master and Judge. *Peer v. North-West Transportation Co.*, 14 P. R. 381, referred to. *Madigan v. Ferland*, 124.

2. *Change of—County Court Action—Rule 1260—Second Application—Appeal—Law Courts Act, 1895, sec. 9 (2).*]—Where in a County Court action an application has been made to the Master in Chambers, under Rule 1260, to change the place of trial, no appeal lies from his order; and a second application for the same purpose, not based upon any new state of facts arising since the first application was made, will not be entertained by a Judge in Chambers.

McAllister v. Cole, 16 P. R. 105, followed.

Milligan v. Sills, 13 P. R. 350, not followed, with the concurrence of the Judges who decided it, pursuant to sec. 9 (2) of the Law Courts Act, 1895. *Cameron v. Elliott*, 415.

WILL.

See COSTS, ETC., 13.

WINDING-UP.

See COSTS, ETC., 38.

WITNESS.

See CONTEMPT OF COURT.

WORDS.

"*Appeal from a Single Judge*," in Rule 1487 (803).]—*See* COSTS, ETC., 29.

"*Damages*," in Law Courts Act, 1895, sec. 28, not alimony.]—*See* WRIT OF SUMMONS, 2.

"*Debt*," in Law Courts Act, 1895, sec. 28, not alimony.]—*See* WRIT OF SUMMONS, 2.

"*Documents*," in Rule 507.]—*See* DISCOVERY, 8.

"*Good cause*," in R. S. O. ch. 53, sec. 43.]—*See* ARBITRATION AND AWARD.

"*Parties affected*," in Rule 536.]—*See* ATTACHMENT OF DEBTS, 1.

"*Proceeding for the same cause*," in Rule 1243.]—*See* COSTS, ETC., 34.

"*Proceeding*," in Rule 1243.]—*See* COSTS, ETC., 34.

"*Specially ordered*," in Rule 1487 (803).]—*See* COSTS, ETC., 29.

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"*Transfer*," in Rule 928.]—*See* JUDGMENT DEBTOR, 4.

"*Within Ontario*," in Rule 935.]—*See* ATTACHMENT OF DEBTS, 3.

"*Very right and justice of the case*," in Rule 444.]—*See* AMENDMENT, 7.

WRIT OF SUMMONS.

1. *Service out of Jurisdiction*—Rule 271 (e)—*Contract by Correspondence—Place of Performance—Breach.*]—The plaintiff, in London, Ontario, wrote to the defendant in Quebec, offering to take a quantity of empty oil barrels. The defendant, by letter posted in Quebec, accepted the offer, saying he would ship them, but some time afterwards wrote again, refusing to do so:—

Held, that this contract was made in Quebec, and, in the absence of an express agreement to the contrary, was to be performed there by delivery of the goods to carriers to be carried to London; and the cause of action was, therefore, not one in respect of which service of the writ of summons out of the jurisdiction could properly be allowed under Rule 271 (e), (1309).

Judgment of the County Court of Middlesex reversed. *Empire Oil Company v. Vallerand*, 27.

2. *Service out of Jurisdiction—Alimony—Contract—Marriage—Law Courts Act, 1895, sec. 28.*]—The right to alimony is not based on contract, but on the special statutory provisions now found in sec. 29 of the Judicature Act, R. S. O. ch. 44.

Alimony, when granted, is not to be classed either as "debt" or "damages," terms which define the scope of sec. 28 of the Law Courts Act, 1895, providing for the allowance of service out of the jurisdiction of a writ of summons where the plaintiff has a good cause of action upon a contract, and the defendant has assets in Ontario: it is that allowance to which a married woman is entitled upon separation from her husband.

Magurn v. Magurn, 3 O. R. 579 ;
Keith v. Keith, 25 Gr. 113 ; and
Hooper v. Hooper, 3 Sw. & Tr. 256,
followed.

Service of writ of summons out of the jurisdiction in an action for alimony disallowed. *Wheeler v. Wheeler*, 45.

See AMENDMENT, 5—JUDGMENT,
9 10.

